

3012

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,

Appellant,

vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 266)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED
DEC - 3 1956
PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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GORRILL,

1 Montgomery Street,
San Francisco 4,

Counsel for Appellant.

HANCOCK, ELKINGTON & ROTHERT,

111 Sutter Street,
San Francisco 4,

Counsel for Appellees.

EXCERPT FROM DOCKET ENTRIES

1954

Dec. 10—Filed petition on removal—copy of complaint and summons attached.

Dec. 10—Filed bond on removal in sum \$250.00.

* * *

1955

Jan. 10—Filed answer of Hunt Foods, Inc., with counterclaim and cross-claim.

Jan. 25—Filed answer of plaintiff to counterclaim and cross-claim of debts.

Feb. 2—Filed demand by plaintiff for jury trial.

* * *

Aug. 15—Ordered for trial Oct. 24, 1955.

* * *

Oct. 7—Filed notice and motion by defendant to dismiss or for judgment on pleadings, Oct. 17, 1955.

* * *

Oct. 24—Ordered after hearing, motions to dismiss and for judgment on pleadings, memos to be filed 5-5 days and motions continued to Nov. 4, 1955, for submission.

* * *

Nov. 22—Filed order denying motions to dismiss and for judgment on pleadings.

* * *

1955

- Nov. 28—Jury trial—plaintiff waived jury and was assessed fees (\$154.00). Evidence and exhibits introduced and further trial continued to Nov. 29, 1955.
- Nov. 29—Further trial. Evidence and exhibits introduced and further trial continued to Nov. 30, 1955.
- Nov. 30—Further trial. Evidence introduced and further trial continued to Dec. 1, 1955.
- Dec. 1—Further trial. Evidence and exhibits introduced and further trial continued to Dec. 2, 1955.
- Dec. 2—Further trial. Evidence and exhibits introduced, ruling on motion of defendant to dismiss reserved. Memos ordered filed 15-15-10 days and case continued to Jan. 14, 1956, for submission. Exhibits ordered returned to Clerk when briefs are filed.

* * *

1956

- Apr. 17—Filed order for judgment for plaintiff in sum \$21,500.00 and for defendant on cross-complaint for \$11,495.16.

* * *

- May 15—Lodged findings and conclusions by plaintiff.
- May 15—Lodged judgment by plaintiff.
- May 16—Filed Hunt Foods' proposed modifications to findings and conclusions with proposed judgment.

1956

June 7—Filed findings of fact and conclusions of law.

June 7—Entered judgment—filed June 7, 1956—
for Plaintiff vs. Hunt Foods, Inc., in sum
\$21,500.00 and costs, and for Hunt Foods
vs. Plaintiff on cross-complaint in sum
\$11,495.16.

June 13—Filed memo of costs by plaintiff (\$296.62).

June 13—Filed supersedeas bond of Hunt Foods
Co. in sum \$12,000.00. “Approved June
13, 1956; Louis E. Goodman, U. S. Dis-
trict Judge.”

June 14—Filed memo of costs by defendant
(\$620.40).

June 14—Costs allowed plaintiff \$97.35.

* * *

June 18—Filed notice of appeal by defendants.

* * *

June 27—Filed appellant’s designation of record on
appeal.

June 27—Filed statement of points upon which ap-
pellant intends to rely on appeal.

* * *

July 5—Filed appellee’s designation of record on
appeal.

* * *

In the United States District Court for the Northern District of California, Southern Division

No. 34288

WELLINGTON PHILLIPS and H. W. LIHOLM,
Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation; JOHN DOE, RICHARD ROE, XYZ CORPORATION, a Corporation, and BLACK & WHITE COMPANY,
Defendants.

PETITION FOR REMOVAL

To the Honorable, the United States District Court for the Northern District of California, Southern Division:

The petition of Hunt Foods, Inc., a corporation, respectfully shows:

I.

Petitioner is one of the defendants in an action entitled as above which was commenced by the above-named plaintiffs against the above-named defendants in the Superior Court of the State of California in and for the County of Alameda. Said action was filed on November 12, 1954, being numbered 261,524 in the files of said Court and is now pending.

II.

Attached to the original herewith and made a part of this Petition as though set forth in full are full, true and correct copies of all process, pleadings and

orders heretofore served upon petitioner in said action, Petitioner was served with Summons and Complaint in said action on November 30, 1954. Petitioner has not filed or served any Answer, Demurrer or other pleading or motion in said action, and petitioner's time to answer or plead to the Complaint in said action will expire on December 10, 1954.

III.

Said action is of a civil nature and the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

IV.

At the time of the commencement of said action, petitioner was and at all times thereafter has been and now is a corporation, organized and existing under the laws of the State of Delaware, and as such is a resident and citizen of the State of Delaware, and not a resident or citizen of the State of California.

V.

Defendants above-named are the only defendants in said action. The names of all defendants, except that of petitioner, are fictitious names.

VI.

Petitioner desires to remove said action to this Court as permitted by law.

VII.

Petitioner presents and files herewith a bond with good and sufficient surety conditioned that peti-

tioner will pay all costs and disbursements incurred by reason of removal proceedings should it be determined that said action was not removable or was improperly removed.

VIII.

November 30, 1954, was the date upon which petitioner first received the said Summons and Complaint.

Wherefore, petitioner prays that this Court accept and approve this petition and said bond and surety; that said action stand removed; that this Court issue all necessary orders and process to bring before it all proper parties to this action, whether served by process issued by said State Court or otherwise; that this Court take and retain jurisdiction over the entire cause and determine all issues involved in said action; and for such other and further orders as may be just.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Petitioner.

Duly verified.

In the Superior Court of the State of California,
in and for the County of Alameda

No. 261,524

WELLINGTON PHILLIPS and H. W. LI-
HOLM, Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation; JOHN
DOE, RICHARD ROE, XYZ CORPORA-
TION, a Corporation, and BLACK & WHITE
COMPANY, Defendants.

COMPLAINT FOR DAMAGES FOR
BREACH OF CONTRACT

Now comes plaintiffs above-named and for their
First Cause of Action against the above-named de-
fendants, and each of them, allege as follows:

I.

At all times herein mentioned plaintiff Wellington Phillips and plaintiff L. W. Liholm were, and they now are doing business under the name of Wellington Phillips & Co., and engaged in the general business of selling various products to military and governmental agencies, with their office in the City and County of San Francisco, State of California.

II.

The true names of the defendants sued herein under the names of John Doe, Richard Roe, XYZ Corporation, a corporation, and Black & White

Company, are, and each of them is, unknown to plaintiffs, and the said names are fictitious names. Plaintiffs pray leave to amend this complaint by inserting herein the true name of each said defendant when said true name is ascertained.

III.

At all times herein mentioned Hunt Foods, Inc., was and now is a corporation qualified to engage in and engaging in the business of manufacturing and selling canned food and other foodstuffs in the State of California and elsewhere.

IV.

In the month of November, 1951, in the County of Alameda, State of California, the exact date of which is now unknown to plaintiffs, plaintiffs and defendants entered into an oral agreement which provided as follows:

1. Defendants appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendants for sales of products of the defendants to all military stations, camps, posts and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California and to the military purchasing offices in San Francisco, California, and in Northern California for overseas bases, and overseas units and to military ships making purchases in Northern California and for direct sales to overseas military units, bases and installations.

2. Defendants appointed plaintiffs as said exclusive military service jobber and representative for a period of ten years from the date of said oral agreement.

3. Plaintiffs' compensation for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendants' products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sales of the food products of defendants pursuant to said agreement.

V.

Prior to and at the time of the making of said oral agreement plaintiffs informed defendants that in order fully to promote and increase the volume of the sales of defendants' products as exclusive military service jobber and representative in the area aforesaid (1) plaintiffs would for approximately two years sell defendants' products at about plaintiffs' cost, or below cost, and without substantial profit and would expect and plan to sell defendants' products at a normal profit when said volume of sales of defendants' products had been increased about two years subsequent to December 1, 1951, and (2) plaintiffs would decrease and eventually abandon plaintiffs' activity in plaintiffs' prior business of bidding for military purchases of various products sold by plaintiffs either as a broker or as sales agent prior to December 1, 1951. At said

time prior to the making of said oral agreement plaintiffs also informed defendants that plaintiffs would give up and release certain capital funds necessary in the conduct of said bidding business but not necessary in the performance of said oral contract with defendants.

VI.

During the period from December 1, 1951, to the month of May, 1953, plaintiffs did substantially abandon plaintiffs' activity in said former bidding business in order fully to perform said oral agreement and did give up and release \$10,000 of capital funds formerly used in said prior bidding business and did, in order to promote the sales of defendants' products, sell large quantities of defendants' products at, or about cost and below cost, without substantial profit.

VII.

In March or April, 1953, the exact date of which is unknown to plaintiffs, defendants, and each of them, violated and breached said oral agreement in that said defendants at said time authorized and appointed another business firm to represent defendants as exclusive military service agents and sales representatives to sell defendants' products in sales to the military units, bases, posts, establishments, ships purchasing offices and installations in Northern California and overseas hereinabove mentioned in Paragraph IV.

VIII.

At all times from the making of said oral agree-

ment in November, 1951, to and including about the 1st of May, 1953, plaintiffs duly and fully performed each and all of the obligations on plaintiffs' part to perform under said oral agreement.

IX.

As a result of the sale by plaintiffs of defendants' products without substantial profit during the period from December 1, 1951, to May 1, 1953, as aforesaid, plaintiffs' business credit has been, and now is, damaged and impaired. As a result of the release by plaintiffs of capital funds as aforesaid plaintiffs have at all times subsequent to May 1, 1953, had no substantial funds with which to finance or renew plaintiffs' former business of bidding for military purchases and as a result of plaintiffs' said damaged and impaired business credit plaintiffs have at all times since May 1, 1953, and now are, unable to borrow any adequate or substantial funds for said purpose and have been unable to renew or carry on said prior business of bidding for military purchases.

X.

At the times plaintiffs informed defendants that plaintiffs planned to sell defendants' products at or below cost for a period of two years and planned to decrease and eventually abandon plaintiffs' prior bidding business and to give up and release certain capital funds, as more fully alleged hereinabove in paragraph V, defendants, and each of them, approved and consented to each and all of the said

plans about which plaintiffs informed defendants, and each of them, as aforesaid.

XI.

As a direct and proximate result of the said breach and violation of said oral agreement by defendants, and each of them, as aforesaid, plaintiffs were damaged in the sum of \$380,000 in that plaintiffs were deprived of the opportunity and contractual right, for a period of about eight years from and after said breach and violation of said oral agreement, to earn a reasonable or any profit in the performance of said oral agreement. Plaintiffs are informed and believe, and upon such information and belief allege, that plaintiffs have been damaged in the sum of \$10,000 for the first year subsequent to May 1, 1953, in the sum of \$35,000 for each of the second and third years subsequent to May 1, 1953, and in the sum of \$60,000 in each of the fourth, fifth, sixth, seventh, and eight years subsequent to May 1, 1953.

As and for a Second, Separate and Distinct Cause of Action Against Defendants, and Each of Them, Plaintiffs Allege as follows:

I.

Plaintiffs refer to and incorporate herein and make a part hereof as fully as if set out in full herein each and all of plaintiff's allegations hereinabove contained in paragraphs I, II and III of the First Cause of Action contained in this complaint.

II.

In the month of November, 1951, in the County of Alameda, State of California, the exact date of which is now unknown to plaintiffs, plaintiffs and defendants entered into an oral agreement which provided as follows:

1. Defendants appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendants for sales of products of the defendants to all military stations, camps, posts and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California and to the military purchasing offices in San Francisco, California, and in Northern California for overseas bases, and overseas units and to military ships making purchases in Northern California and for direct sales to overseas military units, bases and installations.

2. Defendant appointed plaintiffs as said exclusive military service jobber and representative for an indefinite and reasonable period of time from the date of said oral agreement.

3. Plaintiffs' compensation for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendants' products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sale of the

food products of defendants pursuant to said agreement.

III.

Plaintiffs refer to and incorporate herein and make a part hereof as fully as if set out in full herein each and all of the allegations hereinabove contained in paragraphs V, VI, VII, VIII, IX and X of the First Cause of Action contained in this complaint.

IV.

Plaintiffs are informed and believe, and upon such information and belief allege, that a reasonable time for the performance of the said oral agreement hereinabove alleged, then was and now is a period of ten years.

VI.

As a direct and proximate result of the violation and breach of said oral agreement by defendants, and each of them, as aforesaid, plaintiffs were damaged in the sum of \$380,000. Plaintiffs are informed and believe, and upon such information and belief allege, that plaintiffs were damaged in the sum of \$10,000 for the first year subsequent to May 1, 1953, \$35,000 for each of the second and third years subsequent to May 1, 1953, and in the sum of \$60,000 in each of the fourth, fifth, sixth, seventh and eighth years subsequent to May 1, 1953.

Wherefore, plaintiffs pray judgment against defendants, and each of them, for the sum of Three Hundred Eighty Thousand Dollars (\$380,000), for plaintiffs' costs of suit incurred herein and for such

other and further relief as the Court deems meet and equitable in the premises.

HANCOCK, ELKINGTON &
ROTHERT,
Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed November 12, 1954.

[Endorsed]: Filed December 10, 1954, U.S.D.C.

[Title of District Court and Cause.]

UNDERTAKING ON REMOVAL

Know All Men by These Presents:

That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania and duly authorized to transact a general surety business in the State of California, is held and firmly bound unto the plaintiffs above named and each of them in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, for the payment of which said sum well and truly to be made unto the said plaintiffs the said Indemnity Insurance Company of North America binds itself, its successors, representatives and assigns firmly by these presents.

The condition of the above obligation is such that whereas Hunt Foods, Inc., a corporation, is about to file its petition in the United States District

Court for the Northern District of California for the removal of a certain cause pending in the Superior Court of the State of California in and for the County of Alameda and numbered 261524, wherein the above-named plaintiffs are all the parties plaintiff and wherein said Hunt Foods, Inc., is one of the parties defendant, to the United States District Court for the Northern District of California;

Now, Therefore, if the said Hunt Foods, Inc., shall well and truly pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that said suit was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof said Indemnity Insurance Company of North America has caused these presents to be signed and its corporate seal to be affixed this 9th day of December, 1954.

[Seal]

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

By /s/ G. B. FOSTER,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 9th day of December, in the year one thousand nine hundred and fifty-four, before me,

Alice Browne, a Notary Public in and for the City and County of San Francisco, personally appeared G. B. Foster, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-Fact.

[Seal] /s/ ALICE BROWNE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 28, 1956.

[Endorsed]: Filed December 10, 1954.

[Title of District Court and Cause.]

ANSWER, COUNTERCLAIM AND
CROSS-COMPLAINT

Defendant, Hunt Foods, Inc., a corporation, answering the Complaint of plaintiffs, admits, denies and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs I and II of the first cause of action.

II.

Answering the allegations in paragraph IV of the First Cause of Action, defendant denies each and all

the allegations therein contained except as herein in this paragraph expressly alleged and in that respect defendant alleges that: prior to November 26, 1951, defendant's salesmen sold its products to United States Government Commissary Stores in the San Francisco Bay Area and southerly to Paso Robles, all in the State of California, hereinafter referred to as the San Francisco Area. On or about November 26, 1951, defendant designated plaintiffs as its representative to sell its products to Government Commissary Stores in said San Francisco Area, under an arrangement whereby plaintiffs were to purchase merchandise from defendant at defendant's regular price to customers, receiving a cash discount only, and thence plaintiffs were to resell to said Government Commissary Stores. A small credit line was given by defendant to plaintiffs on a ten-day basis. Thereafter defendant sold merchandise to plaintiffs under said arrangement, but during the month of January, 1952, and continuously thereafter, plaintiffs neglected to pay defendant according to said arrangement and the amount in default gradually increased so that on or about May 12, 1952, plaintiffs were indebted to defendant for merchandise sold by defendant to plaintiffs under said arrangement in a sum in excess of \$19,000, all of which indebtedness was in default and which plaintiffs were unable to pay or satisfy. On May 12, 1952, as security for defendant, plaintiffs executed in writing an assignment to defendant of certain specific accounts receivable, totaling \$17,754.21, and of all amounts which may become due there-

after to plaintiffs arising out of resales of goods, wares and merchandise purchased by plaintiffs from defendant. Thereafter plaintiffs collected said specific accounts and other accounts covered by said assignment but failed, neglected and refused to pay the same to defendant, and defendant is informed and believes and therefore alleges that plaintiffs used some or all of said sums for the personal benefit and comfort of plaintiffs. By the wilful and deliberate acts of plaintiffs, said security was rendered valueless and is now of no value whatsoever. On or about April 23, 1953, the indebtedness of plaintiffs to defendant for goods and merchandise sold amounted to \$27,388.85, all of which indebtedness was in default and which plaintiffs were unable to pay or satisfy. On or about April 24, 1953, defendant notified plaintiffs that defendant would no longer sell its merchandise to plaintiffs for sale to Government Commissary Stores.

III.

Answering the allegations in paragraph V of the First Cause of Action, defendant denies each and all the allegations therein contained.

IV.

Answering the allegations in paragraphs VI, VII and VIII of the First Cause of Action, defendant denies that there was at any time an oral contract as alleged in the Complaint; denies that there was at any time any breach by defendant of any contract, and alleges that the arrangement between plaintiffs and defendant was that alleged in para-

graph II above in this answer. Defendant admits that as of May 1, 1953, it appointed a business firm other than plaintiffs to handle sale of defendant's products to Government Commissary Stores in the said San Francisco Area and elsewhere in the world. As to all allegations in said paragraphs VI, VII and VIII not herein expressly denied or admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

V.

Answering the allegations of paragraph IX of the First Cause of Action, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein. Defendant alleges that the impairment, if any, of plaintiffs' credit, capital and business, or any of them, was and is caused by acts of the plaintiffs and was not directly or indirectly in any manner caused by any act or omission of defendant.

VI.

Answering the allegations of paragraph X of the First Cause of Action, defendant denies each and all the allegations therein contained.

VII.

Answering the allegations of paragraph XI of the First Cause of Action, defendant denies that plaintiffs have been damaged in any amount by any act or omission of defendant; denies that there was ever an agreement between the parties as alleged in said Complaint and denies that defendant at any

time breached any alleged agreement between the parties. As to all allegations in said paragraph XI not expressly denied herein, defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

Answer to Second Cause of Action

I.

Answering the allegations of paragraph I of the Second Cause of Action, defendant refers to and incorporates herein as if set forth in full, each and all of the denials, admissions and allegations contained in paragraph I of the answer to the First Cause of Action.

II.

Answering the allegations of paragraph II of the Second Cause of Action, defendant refers to and incorporates herein and makes a part hereof as fully as if set forth in full, each and all of defendant's denials and allegations hereinabove contained in paragraph II of the answer to the First Cause of Action.

III.

Answering the allegations of paragraph III of the Second Cause of Action, defendant refers to and incorporates herein and makes a part hereof each and all the denials and allegations contained in paragraphs III and IV of the answer to the First Cause of Action.

IV.

Answering the allegations contained in paragraph

IV of the Second Cause of Action, defendant denies each and all the allegations therein contained.

V.

Answering the allegations contained in paragraph V of the Second Cause of Action (designated as paragraph VI in the Complaint) defendant denies each and all the allegations therein contained, and further denies that any act or omission of defendant at any time caused any loss or damage to plaintiffs.

Separate Defense

The purported agreement mentioned in the Complaint by which defendant is sought to be charged was and is by its allegations not to be performed within one year from the making thereof; was never subscribed by the defendant or its agent in writing, nor was there any note or memorandum thereof subscribed by defendant or its agent.

First Affirmative Defense, Counterclaim and Cross-Complaint

Plaintiffs owe defendant \$11,495.16 for goods sold and delivered by defendant to plaintiffs between December 1, 1951, and August 10, 1953.

Second Affirmative Defense, Counterclaim and Cross-Complaint

Ever since July 8, 1953, and now, plaintiffs owe defendant \$11,495.16 according to an open account between the parties, which sum plaintiffs agreed to pay to defendant but have neglected and refused

and still neglect and refuse to pay the said sum or any part thereof.

Third Affirmative Defense, Counterclaim and Cross-Complaint

On November 1, 1954, an account was stated by and between defendant and plaintiffs, under and by virtue of which plaintiffs are indebted to defendant in the sum of \$11,495.16, no part of which has been paid. A copy of said account stated, is attached hereto, marked "Exhibit A" and made a part hereof.

Fourth Affirmative Defense, Counterclaim and Cross-Complaint

I.

On July 14, 1953, plaintiffs accepted three trade acceptances numbered, respectively, 70,452, 70,453, and 70,454. Said trade acceptances were made by defendant on July 8, 1953, and, respectively, required plaintiffs to pay to the defendant as follows: under trade acceptance #70,452, the sum of \$4,439.79 on October 1, 1953; under trade acceptance #70,453, the sum of \$4,439.79 on November 1, 1953; under trade acceptance #70,454 the sum of \$4,439.79 on December 1, 1953. A copy of each trade acceptance is hereto annexed, marked Exhibits B, C and D, respectively, and is hereby made a part hereof as if set forth in full.

II.

Plaintiffs paid to defendant \$1,824.21 only on account of said trade acceptance number 70,452, and

plaintiffs owe to defendant \$2,615.55, the balance due and unpaid on said trade acceptance.

III.

Plaintiffs owe to defendant the full amount of each of said trade acceptances numbered 70,453 and 70,454, to wit: \$8,879.58.

IV.

In each of said trade acceptances plaintiffs agreed to pay all costs of collection including attorneys' fees which defendant may incur in collection thereon. Defendant is informed and believes and therefore alleges that costs and attorneys fees in collection thereof will amount to not less than \$2,500, the exact amount being now unknown.

Wherefore, defendant prays that:

1. Plaintiffs take nothing by their Complaint;

2. This Court award judgment in favor of defendant and against plaintiffs in the sum of \$11,-495.16, together with interest thereon at the legal rate of interest as follows: on said trade acceptance No. 70,452, on \$2,615.55 from October 1, 1953; on trade acceptance No. 70,453 on the full amount thereof from November 1, 1953, and on said trade acceptance No. 70,454 on the full amount thereof from December 1, 1953;

3. This Court award to defendant its costs and attorneys' fees in the sum of \$2,500.00 or such

greater or lesser amount as may be established to the satisfaction of the Court.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Hunt Foods, Inc.

Duly verified.

EXHIBIT A

Statement
Hunt Foods, Inc.

To: Wellington Phillips & Co. (A Partnership)
915 Bryant Street,
San Francisco, California.

Date: November 1, 1954.

Date	Reference	Debit	Credit	Balance
Balance on Trade Acceptances				
July 3, 1953		\$22,198.94		
The following payments have been received:				
8/19/53			\$1,198.94	
9/ 3/53			1,000.00	
9/ 4/53			500.00	
9/21/53			750.00	
9/25/53			750.00	
9/30/53			240.85	
11/16/53			1,000.00	
11/27/53			1,500.00	
1/ 6/54			2,000.00	
4/21/54			576.49	
5/10/54			587.50	
6/ 9/54			200.00	
9/13/54			400.00	

Balance due on Trade Acceptances:

11/ 1/54	\$11,495.16
#70452	
#70453	
#70454	

Statement

Hunt Foods, Inc.

To: Wellington Phillips & Co. (A Partnership)
 915 Bryant Street,
 San Francisco, California.

Date: November 1, 1954.

Date	Reference	Debit	Credit	Balance
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Statement of Unpaid Trade Acceptances

Trade Acceptance

#70452 \$4,439.79

The following payments received have
 been applied against Trade Ac-
 ceptance #70452:

Balance of payment rec'd. 1/6/54 \$ 60.22

4/21/54 576.49

5/10/54 587.50

6/ 9/54 200.00

9/13/54 400.00

Balance due on Trade

Acceptance #70452 \$ 2,615.58

Trade Acceptance #70453 4,439.79

Trade Acceptance #70454 4,439.79

Total Due \$11,495.16

29

0152

EXHIBIT B

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 10/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

LLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

0153

EXHIBIT C

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 11/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

LLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

0154

EXHIBIT D

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 12/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

LLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

Endorsed F.P. Kariger January 17 1954

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM AND
CROSS-COMPLAINT

Now comes Wellington Phillips and H. W. Liholm, plaintiffs above named, and for their answer to the Counterclaim and Cross-Complaint of Defendant Hunt Foods, Inc., a corporation, admit, deny and aver as follows:

I.

Answering the First Affirmative Defense, Counter-Claim and Cross-complaint, plaintiffs deny generally and specifically, each and every, all and singular, the allegations thereof.

II.

Answering the Second Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs deny generally and specifically, each and every, all and singular, the allegations thereof.

III.

Answering the Third Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs admit that on November 1, 1954, an account was stated by and between defendant and plaintiff showing that plaintiffs were indebted to defendant in the sum of \$11,-495.16, no part of which has been paid and that a copy of said account stated is attached to the Answer of defendant Hunt Foods, Inc., and marked Exhibit "A."

IV.

Answering the Fourth Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs admit the allegations of paragraphs I, II, and III thereof and in this connection aver that on July 14, 1953, plaintiffs also accepted two additional trade acceptances numbered 70450 and 70451 in the sum of \$4,439.79 and \$4,439.78, respectively, and paid off said trade acceptances subsequent to July 14, 1953, and deny generally and specially, each and every, all and singular, the remaining allegations contained in said Fourth Affirmative Defense, Counterclaim and Cross-complaint not hereinabove specifically admitted.

Wherefore, plaintiffs pray that defendant Hunt Foods, Inc., take nothing by its Answer, Counterclaim and Cross-Complaint herein and that plaintiffs have judgment herein against said defendant as prayed in the complaint herein.

HANCOCK, ELKINGTON &
ROTHERT,

/s/ HARLOW P. ROTHERT.

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR
JUDGMENT ON THE PLEADINGS

The defendant, Hunt Foods, Inc., a corporation,
moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against this defendant upon which relief can be granted.
2. For a judgment on the pleadings in favor of this defendant in the sum of \$11,495.16, together with costs and reasonable attorneys' fees.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Hunt Foods, Inc.

Notice of Motion

To the Plaintiffs above named and to Harlow P.
Rothert, Esq., and Hancock, Elkington & Roth-
ert, their attorneys:

Please take notice that the undersigned will bring the above motions on for hearing before the above-entitled Court on October 17, 1955, in the Department of the Presiding Judge in the above-entitled Court at 10:00 o'clock a. m. in the Federal Court, Post Office Building, Seventh and Mission Streets,

in the City and County of San Francisco, State of California. Said motions will be made pursuant to Rule 12 of the Rules of Civil Procedure of the United States District Courts and will be based upon records and files in the above-entitled action.

Dated: October 7, 1955.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Foods, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AND DENYING MOTION FOR JUDG-
MENT ON THE PLEADINGS

This matter having been argued, briefed and submitted for ruling,

It is ordered that defendants' motion to dismiss be, and the same hereby is, denied;

It is further ordered that defendants' motion for judgment on the pleadings be, and the same hereby is, denied.

Dated: November 22, 1955.

/s/ GEORGE B. HARRIS,

United States District Judge.

Tuek v. Gudnason,

11 C. A. 2d 626.

[Endorsed]: Filed November 22, 1955.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

In this diversity case, Phillips seeks damages against Hunt Foods, Inc., for breach of contract. It is admitted that the amount sought by Hunt in its cross-complaint, viz. \$11,495.16, is owing and unpaid.

Approximately 120 pages of briefs have been filed. To resolve the many questions of California law tendered would require a judicial excursion which would take the Court too far away from its many other litigants. But this is not necessary. We need not determine these many questions. As is sometimes the case, the legal arguments have obscured the facts. And this case can be justly decided on the facts. It is not substantially dissimilar to *Millet v. Park & Tilford*, 127 Fed. Supp. 494 (Judge Murphy).

It is my opinion that, upon the evidence, there was an oral contract between Phillips and Hunt evidenced by some written memoranda, that it was

to continue for a reasonable time, that recovery is not prevented by the Statute of Frauds, and that long before a reasonable time had elapsed, Hunt unfairly terminated the contract, not because of any real default on the part of Phillips, but because Hunt thought there was more profit or benefit elsewhere.

Phillips was damaged. His damages are difficult of ascertainment; in part, they are speculative. Upon the most reasonable basis of computation available, I approximate as a just amount of such damage, the sum of \$21,500.00.

Judgment will therefore go in favor of plaintiff, upon findings to be submitted pursuant to Rules, in the sum of \$21,500.00. Defendant will have judgment on the cross-complaint in the sum of \$11,495.16.

Dated: April 17, 1956.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis E.

Goodman presiding, on November 28, 29, and 30, and December 1, 1955; plaintiffs appearing by Wellington Phillips and by their attorney, Harlow P. Rothert, Esq., defendant Hunt Foods, Inc., a corporation, appearing by its attorneys Vincent Culinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced the matter having been submitted upon briefs for the court's decision and the Court being fully advised hereby makes the following findings of fact:

Findings of Fact

I.

It is true that plaintiffs Wellington and Phillips and H. W. Liholm were at all times mentioned in the complaint herein partners doing business under the name of Wellington Phillips & Co. and engaged in the business of selling various products to military and governmental agencies with their offices in the City and County of San Francisco, State of California.

II.

It is true that at all times mentioned in said complaint Hunt Foods, Inc., was a corporation qualified to engage in, and engaging in the business of manufacturing and selling canned food and other foodstuffs in the State of California and elsewhere.

III.

It is true that during the period from September 1, 1951, to November 30, 1951, plaintiffs and defendant Hunt Foods, Inc., a corporation, made and en-

tered into an oral agreement which provided as follows:

1. Said defendant appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendant for sales of defendant's products to all military stations, camps, posts, post exchanges and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California.

2. Defendant appointed plaintiffs as said exclusive military service jobber and representative for an unspecified period of time commencing on December 1, 1951.

3. The compensation of plaintiffs for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendant's products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sale of defendant's food products pursuant to said agreement and to perform the duties and obligations of exclusive military service jobber, representative and agent for defendant in sales to said military stations, camps, posts, post exchanges and other military installations in Northern California.

IV.

It is true that prior to and at the time of making said oral agreement plaintiffs informed defendant

Hunt Foods, Inc., a corporation, that in order to fully promote and increase the volume of sales of defendant's products as said exclusive military service jobber and representative in Northern California plaintiffs would (1) for approximately two years sell defendant's products to said military installations at about plaintiffs costs and without substantial profit and would expect and plan to sell defendant's products at a normal profit after the elapse of approximately two years from the commencement of the performance of said oral contract, and (2) plaintiffs would decrease and eventually abandon plaintiffs' activity in plaintiffs' prior business of bidding for military purchases of various products sold by plaintiffs prior to December 1, 1951.

V.

During the period from December 1, 1951, to the month of May, 1953, plaintiffs did substantially abandon plaintiffs' activity in said former bidding business in order to fully promote the sales of defendant's products during said period and in order to perform said oral agreement and did sell large quantities of defendant's products to said military installations at about plaintiffs' costs and without substantial gross profit.

VI.

On or about April 25, 1953, defendant Hunt Foods, Inc., a corporation, violated and breached said oral agreement in that said defendant at said time authorized and appointed another business

firm to represent defendant as exclusive military service agent and sales representative to sell defendant's products to said military installations in Northern California and notified plaintiffs that plaintiffs' exclusive authority to act as said exclusive military service jobber and representative was terminated.

VII.

At all times from the making of said oral agreement to, and including, about the 25th day of April, 1953, plaintiffs duly and fully performed each and all of the obligations on plaintiffs' part to perform under said oral agreement.

VIII.

As a result of the sale by plaintiffs of defendant's products at about plaintiffs' costs and without substantial gross profit during the period from December 1, 1951, to about April 25, 1953, plaintiffs incurred substantial losses during said period and plaintiffs' business credit became damaged and impaired and plaintiffs were unable subsequent to April 25, 1953, to renew said prior business of bidding for military purchases.

IX.

At the times when plaintiffs informed defendant concerning plaintiffs' intention and plan as hereinabove found in paragraph IV defendant approved and consented to said plans and intentions of plaintiffs.

X.

As a direct and proximate result of said breach and violation of said oral agreement by defendant Hunt Foods, Inc., a corporation, plaintiffs were damaged. The damages are difficult of ascertainment. Upon the most reasonable basis of computation available, the damages of plaintiffs are fixed at the sum of \$21,500.00.

XI.

Except as hereinabove found to be true each and all of the allegations contained in plaintiffs' complaint herein are untrue.

XII.

It is true that on or about July 14, 1953, plaintiffs accepted three trade acceptances numbered respectively 70452, 70453, and 70454, which said trade acceptances obligated plaintiffs to pay to defendant Hunt Foods, Inc., a corporation, respectively, the sum of \$4,439.79 on October 1, 1953, the sum of \$4,439.79 on November 1, 1953, and the sum of \$4,439.79 on December 1, 1953. It is true that plaintiffs paid the defendant the sum of \$1,824.21 on account of said trade acceptance No. 70452 and it is true that the remaining unpaid balance due and owing from plaintiffs to said defendant upon said trade acceptances is the sum of \$11,495.16.

XIII.

Except as hereinabove specifically found to be true herein each and all of the allegations contained in the Answer, Counterclaim and Cross-Complaint of Hunt Foods, Inc., a corporation, are untrue.

Conclusions of Law

Based upon the above Findings of Fact the Court adopts the following Conclusions of Law herein:

I.

Plaintiffs are entitled to a judgment upon plaintiffs' complaint herein against defendant Hunt Foods, Inc., a corporation, in the sum of \$21,500 together with plaintiffs' costs of suit incurred herein.

II.

Defendant Hunt Foods, Inc., a corporation, is entitled to a judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sum of \$11,495.16.

Let judgment be entered accordingly.

Dated: June 7th, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Disapproved as to form.

Dated: May 11, 1956.

CUSHING, CULLINAN,

DUNIWAY & GORRILL,

/s/ VINCENT CULLINAN,

Attorneys for Defendant Hunt Foods, Inc., a Corporation.

Lodged May 15, 1956.

[Endorsed]: Filed June 7, 1956.

[Title of District Court and Cause.]

PROPOSED MODIFICATIONS TO DRAFT OF
PLAINTIFFS' FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendant, Hunt Foods, Inc., submits herewith its proposed modifications to the findings of fact and conclusions of law proposed by plaintiffs.

1.

Proposed Modification of Finding I:

“It is true that plaintiffs Wellington Phillips and H. W. Liholm and Overseas Finance and Trading Co., were at all times mentioned in the complaint herein partners doing business under the name of Wellington Phillips & Co. and engaged in the business of selling various products to military and governmental agencies with their offices in the City and County of San Francisco, State of California.”

Reasons for Proposed Modification:

Overseas Finance and Trading Co. is a limited partner and, therefore, its name should be added as one of the partners in the business of plaintiffs.

2.

Proposed Modification of Subparagraphs 1, 2, and 3 of Finding III:

“1. Said defendant appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber for sales of defendant's products to all military stations, camps, posts, post exchanges and

other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California.”

“2. Defendant appointed plaintiffs as said exclusive military service jobber for an unspecified period of time commencing on December 1, 1951.”

“3. Plaintiffs were entitled to the regular jobber’s price and were free to resell at any price fixed by plaintiffs.”

Reasons for Proposed Modification:

The plaintiffs were a jobber. They were not a “representative” because that term suggests the authority to bind the defendant as a principal. The whole transaction was one of outright sale from defendant to plaintiffs who then resold.

There was no “compensation” to plaintiffs. They purchased at the regular jobber’s discount and were free to resell on their own terms.

3.

Proposed Modification to Subparagraph 4 of Finding III:

“4. Plaintiffs agreed to promote the sale of defendant Hunt Food, Inc.’s food products to said establishments but there was no requirement that plaintiffs purchase any specified or minimum amount of goods.”

Reasons for Proposed Modification:

(a) The statement in plaintiffs’ proposed finding, that the plaintiffs agreed “to perform the

duties and obligations” of exclusive military service jobbers should be deleted. There is no evidence of what “the duties and obligations” of such a jobber are. There is no evidence that such duties and obligations—whatever they are—were ever discussed.

(b) The complaint (page 2, line 31) alleges only that plaintiffs agreed to promote the sale of defendant’s products.

(c) The evidence establishes that there was no quota or minimum amount that plaintiffs were required to purchase. This is a material fact, relative to the mutuality question and should be a part of the findings.

4.

Proposed Modification to Finding IV:

“The partnership of plaintiffs was first formed in April, 1951, and thereafter and until the making of the said oral agreement, plaintiffs’ business consisted of sales of food products to military establishments on a brokerage or on a bidding basis and said partnership had never theretofore acted as a military service jobber representative or agent in sales of food products. Prior to and at the time of making said oral agreement, plaintiffs informed representatives of Hunt Foods, Inc., a corporation, which representatives were not executive officers of that corporation, that in order fully to promote the sale of defendant’s products as military service jobber in Northern California, plaintiffs would for a year or two sell defendant’s products to said mili-

tary installations without substantial profit. Plaintiffs also informed said representatives that they might decrease their activity in their bidding and brokerage business theretofore conducted. Under said oral agreement plaintiffs were at all times free to continue to engage in said bidding or brokerage business or any other business for customers other than defendant Hunt Foods, Inc.”

Reasons for Proposed Modification:

(a) A fact material on the question of damages is that the jobber arrangement was a new type of venture for plaintiffs.

(b) The plaintiffs were free to and did engage in a tremendous volume of other business, a fact material on the issue of damages as well as on the issue of estoppel.

5.

Proposed Modification to Finding No. V:

“During the period from December 1, 1951, to the month of May, 1953, plaintiffs did not substantially abandon their activity in said former bidding business or in said former brokerage business. It is true that during the year 1952, plaintiffs’ brokerage business, for customers other than defendants, increased over the previous year by 30% and their bidding business amounted to 73% of the total business done by plaintiffs in said year. It is true that during the said period plaintiffs on occasions sold defendant’s products without substantial profit.”

Reasons for Proposed Modification:

Defendant is entitled to findings on the business done by plaintiffs for customers other than this defendant. These are material on the issues of damages and estoppel.

6.

Proposed Modification of Finding No. VI:

“No executive officer of defendant Hunt Foods, Inc., a corporation, knew any of the terms of the said oral agreement. The employee of said Hunt Foods with whom plaintiffs negotiated and made the said oral agreement had no written authority to enter into the said oral agreement. On April 25, 1953, defendant Hunt Foods, Inc., a corporation, terminated plaintiffs’ arrangement with said defendant and appointed another business firm to represent defendant as exclusive military services sales representative to sell defendant’s products to said military installations. At said time and for many months prior thereto, plaintiffs were indebted in large sums to defendant Hunt Foods, Inc., for merchandise purchased from defendant, which indebtedness plaintiffs were unable to pay when due, and plaintiffs had been for many months and were at the time of termination unable to comply with defendant’s demand for payment of sums due.”

Reasons for Proposed Modification:

(1) There is no proof that any executive officer of Hunts Foods, Inc., knew any of the terms of the

alleged agreement. This is material on the "Equal Dignities" Rule.

(2) The inability of plaintiffs to pay is material on the issue of damages. The failure to pay is material on the right to terminate, regardless of whether that was the reason given.

7.

Proposed Modification of Finding No. VII:

"At all times from the making of said oral agreement to, and including, the 25th day of April, 1953, plaintiffs were in default in the matter of their payments to defendant for merchandise purchased by plaintiffs from defendant. On April 25, 1953, plaintiffs were indebted to defendant in the sum of \$27,388.85, which indebtedness was in default and which plaintiffs were unable to pay or satisfy."

Reasons for Proposed Modification:

The evidence established that plaintiffs were in default almost from the beginning and that repeated requests for payment were made by defendant, but plaintiffs for one reason or another could not pay.

8.

Proposed Modification of Finding No. VIII.

"Plaintiffs' profits during the period December 1, 1951, to April 25, 1953, were not substantial."

Reasons for Proposed Modification:

Finding No. VIII, as suggested by plaintiffs, would find that plaintiffs' credit was damaged and

that this was due to its handling of defendant's products. There is no evidence that plaintiffs' credit was damaged (nor that they ever had credit) there is a complete lack of evidence that plaintiffs' financial condition was due to the handling of defendant's products. The evidence shows that plaintiffs, in that period, did a quarter of a million dollars of business in products of others than defendant and that they also conducted a substantial brokerage business. The evidence further established that plaintiffs have suffered a fire during the period which wasn't fully compensated by insurance and that plaintiffs had lent large sums of money to their limited partner.

9.

Proposed Modification of Finding No. IX:

"At no time did any executive officer of defendant Hunt Foods, Inc., approve or consent or have knowledge of any plans and intentions of plaintiffs, other than that plaintiffs purchased defendant's products and resold them to said military establishments."

Reasons for Proposed Modification:

The evidence is clear that Phillips talked only to Mr. Flynn, a manager of a branch office, to Mr. Stieger, an assistant manager of a branch office, and to Mr. Miller, a sales manager, in making his arrangements. There was no evidence that any executive officer ever knew of an arrangement such as that claimed by the plaintiffs. All they knew

was that Hunt sold to Phillips who resold to military establishments.

10.

Proposed Modification of Finding No. X:

“As a result of the arrangement between plaintiffs and defendant, plaintiffs did not realize as much a profit during the period December 1, 1951, to April 25, 1953 as they might have made but for the said arrangement.”

Reasons for Proposed Modification:

(a) Plaintiffs did realize some profit.

(b) How they were damaged in the sum of \$21,500 does not appear in plaintiffs' proposed finding X.

11.

Proposed Modification of Finding No. XII:

“It is true that on or about July 14, 1953, plaintiffs accepted three trade acceptances numbered respectively 70452, 70453, and 70454, which said trade acceptances obligated plaintiffs to pay to defendant Hunt Foods, Inc., a corporation, respectively, the sum of \$4,439.79 on October 1, 1953, the sum of \$4,439.79 on November 1, 1953, and the sum of \$4,439.79 on December 1, 1953. Each of said trade acceptances entitles defendant to recover from plaintiffs all costs of collection including attorney fees which defendant incurs in the collection thereof. It is true that plaintiffs paid the defendant the sum of \$1,824.21 only on account of said

trade acceptance No. 70452 and that none of said trade acceptances were paid at maturity and it is true that the remaining unpaid balance due and owing from plaintiffs to said defendant upon said trade acceptances is the sum of \$11,495.16, with interest thereon in the sum of \$2,029.63. Defendant is entitled to recover from plaintiffs all costs incurred in connection with the action filed herein and to recover attorneys' fees in the sum of \$3,000.00."

Reasons for Proposed Modification:

(a) Hunt is entitled to interest on the liquidated amount, the plaintiffs' damages being an offset against the amount due, not a payment.

(b) The interest computation is:

Interest on \$2,615.55 from Oct. 1, 1953 to May 15, 1956:

a) Oct. 1, 1953, to Oct. 1, 1955....\$366.16

b) Oct. 1, 1955, to May 15, 1956

(227 days at .50)..... 113.50

\$479.66

Interest on \$4,439.79 from Nov. 1, 1953,

to Nov. 1, 1955.....\$621.56

Interest on \$4,439.79 from Nov. 1, 1955,

to May 15, 1956 (196 days at .85).....166.60

\$788.16

Interest on \$4,439.79 from Dec. 1, 1953,	
to Dec. 1, 1955.....	\$621.56
Interest on \$4,439.79 from Dec. 1, 1955,	
to May 15, 1956 (165 days at .85).....	140.25
	<hr/>
	\$761.81

Recapitulation

\$ 479.66

788.16

761.81

 \$2,029.63

(c) The amount of attorneys' fee is less than 25% of the judgment obtained.

12.

Proposed Modification of Finding No. XIII:

"A few days prior to November 1, 1954, defendant demanded payment by plaintiffs of the balance owed by plaintiffs to defendant for merchandise sold by defendant to plaintiffs during the period of the said arrangement. At said time, plaintiffs asserted they had a claim for damages for termination of the arrangement. On November 1, 1954, an account was stated by and between the parties under and by virtue of which it was determined that plaintiffs were indebted to defendant in the sum of \$11,495.16, no part of which has been paid."

Reasons for Proposed Modification:

This finding is pertinent to the issue of merger.

Conclusions of Law

Proposed Modification of Paragraph II of the Conclusions of Law:

“Defendant Hunt Foods, Inc., a corporation, is entitled to judgment against plaintiffs, and each of them, upon defendant’s Cross-complaint herein, in the sum of \$13,524.79, together with attorneys’ fees in the sum of \$3,000.00, and defendant’s cost of suit incurred herein.”

Dated: May 15, 1956.

Respectfully submitted,

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

/s/ VINCENT CULLINAN,

BEN C. DUNIWAY,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant
Hunt Foods, Inc.

[Title of District Court and Cause.]

JUDGMENT

(Form Submitted by Defendant)

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis

E. Goodman presiding, on November 28, 29 and 30, and December 1, 1955; plaintiffs appearing by Wellington Phillips, and by their attorney, Harlow P. Rothert, Esq.; defendant Hunt Foods, Inc., a corporation, appearing by its attorneys, Vincent Cullinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced, the matter having been submitted upon briefs for the court's decision, and the court having made and entered herein its findings of fact and conclusions of law, It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. Judgment is hereby granted to plaintiffs upon plaintiffs' complaint against defendant Hunt Foods, Inc., a corporation, in the sum of Twenty-one Thousand Five Hundred Dollars (\$21,500), together with plaintiffs' costs of suit incurred herein.

2. Defendant Hunt Foods, Inc., a corporation, is hereby granted judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sum of Sixteen Thousand Five Hundred Twenty-four and 79/100 Dollars (\$16,524.79), together with defendant's costs of suit incurred herein.

Dated:, 1956.

.....,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34288

WELLINGTON PHILLIPS and H. W. LIHOLM,

Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation, JOHN DOE,
RICHARD ROE, XYZ Corporation, a Corporation, and BLACK & WHITE COMPANY,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis E. Goodman presiding on November 28, 29, and 30, and December 1, 1955, plaintiffs appearing by Wellington Phillips and by their attorney, Harlow P. Rothert, Esq., defendant Hunt Foods, Inc., a corporation, appearing by its attorneys Vincent Cullinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced the matter having been submitted upon briefs for the court's decision and the court having made and entered herein its findings of fact and conclusions of law it is hereby ordered, adjudged and decreed as follows:

1. Judgment is hereby granted to plaintiffs upon plaintiffs' complaint against defendant Hunt Foods,

Inc., a corporation, in the sum of Twenty-One Thousand Five Hundred Dollars (\$21,500), together with plaintiffs' costs of suit incurred herein.

2. Defendant Hunt Foods, Inc., a corporation, is hereby granted judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sume of Eleven Thousand Four Hundred Ninety Five and 16/100 Dollars (\$11,495.16).

Dated: June 7, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Disapproved as to form.

Dated: May 11, 1956.

CUSHING, CULLINAN, DUNI-
WAY & GORRILL,

/s/ VINCENT CULLINAN,
Attorneys for Defendant Hunt
Foods, Inc.

Lodged May 15, 1956.

[Endorsed]: Filed and entered June 7, 1956.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 7th day of June, 1956, against Defendants, the Clerk is requested to tax the following as costs:

Fees of the Clerk:

U. S. Dist. Ct., So. District, Los Angeles (filing fee for Miller deposition subpoena)		\$.75
Complaint Ala. Cty.	\$ 13.00	167.00	\$13.00*
			*Allowed
Jury fees	154.00

Fees of the Marshal:

Service of sub/take/dep., Miller..	10.00	13.50
Service of subpoena, Col. Bevins..	3.50

Fees for witnesses (itemized on reverse side)

10.00

Docket fees under 28 U.S.C. 1923....

20.00

Costs incident to taking of depositions: L. W. Phillips.....(copy)

45.27

Lee Miller

35.10

80.37

35.10*

Process: Service of summons and

complaint

5.00

.....

Total.....

\$296.62

\$142.62† Taxed.

\$ 97.35 Taxed.

*Figures and words in italics were written in green ink on original.

†Figures on original written in green ink and cancelled.

State of California,
County of San Francisco—ss.

I, Harlow P. Rothert, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Vincent Cullinan, Esq., 1 Montgomery St., San Francisco, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 13th day of June, 1956, at 9:45 a.m.

HANCOCK, ELKINGTON &
ROTHERT,

/s/ HARLOW P. ROTHERT,
Attorney for Plaintiff.

Subscribed and sworn to before me this 12th day of June, A.D. 1956, at San Francisco.

[Seal] /s/ JESSIE R. CALDERWOOD,
Notary Public.

Costs are hereby taxed in the amount of \$97.35 this 14th day of June, 1956, and that amount included in the judgment.

/s/ C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 7th day of June, 1956, against Plaintiffs, the Clerk is requested to tax the following as costs:

Fees of the Clerk:

Petition for Removal	\$ 15.00		
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Fees of the Court Reporter:

For all or any part of the transcript necessarily obtained for use in the case		<i>Disallowed*</i>	
	\$473.85		

Costs incident to taking the depositions:

Lee Miller(copy)	\$ 19.50		
W. Phillips	99.05	118.55†	\$99.05*

Filing Petition to Remove, Alameda

County	7.00
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Serving Subpoena, W. J. Reid.....	6.00	13.00
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Total.....		\$620.40	\$127.05*
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On objections, entire bill disallowed.

May 14, 1956.

C. W. CALBREATH,

Clerk;

By /s/ MARGARET P. BLAIR,

Deputy.

*Words and figures in italics written in green ink on margin of original.

†Cancelled on original.

State of California,
City and County of San Francisco—ss.

I, Vincent Cullinan, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Harlow P. Rothert with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 14th day of June, 1956, at 10:00 a.m.

/s/ VINCENT CULLINAN,
Attorney for Defendant.

Subscribed and sworn to before me this 13th day of June, A.D. 1956, at San Francisco, California.

[Seal] /s/ MARION M. GORMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Oct. 18, 1956.

[Endorsed]: Filed June 14, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Court of Appeals:

Notice is hereby given that Hunt Foods, Inc., defendant and cross-complainant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 7, 1956, in which judgment was entered in favor of defendant and cross-complainant in the sum of \$11,495.16 and in which judgment was entered in favor of plaintiffs and cross-defendants in the sum of \$21,500. Said defendant and cross-complainant appeals from that part of the judgment in its favor as well as that part of the judgment in favor of plaintiffs and cross-defendants.

Dated: June 11, 1956.

/s/ VINCENT CULLINAN,

/s/ BEN. C. DUNIWAY,

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

Attorneys for Defendant and Cross-Complainant,
Hunt Foods, Inc.

[Endorsed]: Filed June 18, 1956.

[Title of District Court and Cause.]

BOND

Whereas, the Defendant in the above-entitled action, Hunt Foods, Inc., a Corporation, has appealed to the United States Court of Appeals for the Ninth Circuit from a net judgment of Ten Thousand Four and 84/100ths (\$10,004.84) Dollars, and claimed costs of Two Hundred Seventy-six and No/100ths (\$276.00) Dollars, and made and entered against the Defendant in said action in the United States District Court for the Northern District of California, Southern Division, in favor of the Plaintiff on June 7, 1956;

Whereas, the Appellant is desirous of staying the execution of said judgment so appealed from,

Now, Therefore, in consideration of the premises and of such appeal the undersigned, The Fidelity and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the State of California, does hereby acknowledge itself justly bound in the sum of Twelve Thousand and No/100ths (\$12,000.00) Dollars.

That if Said Judgment Appealed From, or any part thereof, be affirmed or the appeal be dismissed

the Appellant will pay the amount directed to be paid by the judgment, or the part of said amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which shall or may be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the judgment in the court from which the appeal was taken, judgment may be awarded in the said action on motion of respondent, without notice to the undersigned Surety, in their favor against the Surety for such amount together with the interest that may be due thereon and the damages and costs which may be awarded against the Appellant upon the appeal.

In Witness Whereof the Said, The Fidelity and Casualty Company of New York, does cause this obligation to be signed by its duly authorized attorney and its corporate seal to be hereunto affixed at San Francisco, California, this 11th day of June, 1956.

Approved: June 13th, 1956.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Seal]

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

By /s/ LAUREL E. MAY,
Attorney.

State of California,
City and County of San Francisco—ss.

On this 12th day of June, in the year One Thousand Nine Hundred and Fifty-six, before me, C. J. Treganowen, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Laurel E. May, known to me to be the Attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ C. J. TREGANOWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 16, 1958.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

I.

Points upon which appellant relies in the appeal from the judgment of the District Court, awarding judgment in the sum of \$11,495.16 and which fails to include interest, costs and attorney fees.

1. The Cross-Complaint of appellant sets forth three trade acceptances, each of which was for a specified amount and each of which was in default on or before December 1, 1953. Each requires plaintiffs to pay all costs of collection including attorneys' fees. Each of these trade acceptances draws interest, under the law, from the respective maturity dates, to wit, October 1, 1953, November 1, 1953, December 1, 1953.

2. The District Court failed correctly to apply the law in refusing to award appellant interest on the definite amounts that became due, respectively, in October, November, and December, 1953. Unliquidated cross-claims of appellee does not render appellant's trade acceptances unliquidated, and the unliquidated claims of appellee are given treatment as discounts, not as payments made at the time the debt is due.

Cal. Lettuce Growers v. Union Sugar (1955)
45 Cal. (2d) 474, 487.

Lineman v. Schmid (1948) 32 Cal. (2d) 204.

3. The District Court erred in failing to award appellant reasonable attorneys' fees, as provided for in the trade acceptances.

Kirk v. Culley (1927) 202 Cal. 501 at 508.

4. The District Court erred in failing to award appellant its costs of suit in connection with the judgment in appellant's favor, the trade acceptances providing therefor.

5. The Judgment is erroneous in that it does not run against the Limited Partner in the plaintiff partnership.

II.

Points upon which appellant relies in the appeal from the Judgment of the District Court in favor of Plaintiffs.

1. This is an action on an oral contract under which plaintiff was authorized by a district manager of defendant to buy merchandise from defendant and resell it, at prices determined by plaintiffs, to certain specified commissary stores. This was a new type of operation for plaintiff. The plaintiff partnership (consisting of Phillips and Liholm general partners, and Overseas Finance & Trading Co., a limited partner) was formed in late 1950 and engaged in a "bidding business" i.e bidding on food items under government bids. These items are dif-

ferent than the items sold to commissary stores. They also did "brokerage" business which, too, was a substantially different business than selling to commissary stores.

The alleged contract was entered into by plaintiff Phillips and an employee of defendant, now dead. Phillips admits that he was not bound to purchase any minimum or specified amount of goods. Phillips admits that he was not required to cease his bidding or his brokerage business. In fact during the 16 months he was buying and selling Hunt products, he was doing substantial business for others than defendant: he increased his profits in the brokerage business by some 30% and he did over a quarter of a million dollars in his bidding business.

No executive officer of Hunt Foods, Inc., had any knowledge nor any reason to suspect that plaintiffs were operating under a contract such as that asserted in this action.

The evidence shows that plaintiffs never had financial resources sufficient to enable them to buy and sell Hunt merchandise. Defendant never agreed to finance plaintiffs. Hence plaintiffs' inability to perform is clearly established.

There is no basis in the record for any award of prospective damages. The burden of proof is on plaintiffs. Plaintiffs operated for 16 months and had the exclusive for 21 commissaries. His proof consisted only of the volume done for 12 months at one commissary, 4 months at a second commissary and

4 months at a third. He made no effort to show his actual volume at these three commissaries for the full 16 months; he made no effort to show any of his volume at the other 18 commissaries. He used carefully selected fragmentary evidence of sales for limited periods at 3 commissaries as a basis for an inference as to what he did at these for the full period and as an inference of what he did at the other 18 commissaries. On the basis of these guesses, he speculates on what he might have done in the future.

2. The District Court failed correctly to apply the law in that it did not find that the arrangement between the parties was terminable at the will of either.

E. I. Du Pont DeNamour v. Clairborne Reno
(CC8th 1933) 64 Fed. (2d) 224.

Ruinello v. Murray (1951) 36 Cal. (2d) 687.

Curtis Candy Co. v. Silberman (CC 6th
1930). 45 Fed. (2d) 451.

Ford Motor Co. v. Kirkmeyer (CC 4th
1933) 65 Fed. (2d) 1001.

3. The District Court failed correctly to apply the law in that it did not find that the alleged contract, if it was to last for more than one year, was invalid under the Statute of Frauds.

Jurschik v. Farmers & Merchants Bank
(1951) 107 Cal. App. (2d) 405.

Smith v. Smith (1954) 126 Cal. App. (2d) 194.

4. The District Court failed correctly to apply the law (known as the "Equal Dignities Rule") or to find the fact that no executive officer of appellant was aware of any alleged contract which was to last for more than one year. The court ignored this fatal failure of proof on the part of plaintiffs and made no finding on this matter, although the evidence shows without contradiction that no executive officer was aware of the contract claimed by plaintiffs and found by the Court.

California Civil Code 2309 and 1624.

Ekwood Lumber Co. v. Moore Well Lumber Co. (CC 9th 1938) 97 Fed. (2d) 402.

Anderson v. Standard Lumber Co. (1923) 64 Cal. App. 410.

5. The District Court failed correctly to apply the law requiring Mutuality in a contract wherein the plaintiffs are not obligated to purchase any goods of a defendant and in which the plaintiffs are not required to cease other business.

Scott v. Cline Elec. Co. (1930) 104 Cal. App. 122.

Leach v. Kentucky Coal Co., 256 Fed. 686.

E. I. Du Pont de Nemours v. Clairbourne-Reno Co. (8th CC 1933) 64 Fed. (2d) 224 at 232.

Lawrence Block Co., v. Palston (1954) 123
Cal. App. 2d) 300.

6. The District Court failed correctly to apply the law in that it held that plaintiffs could recover damages where the proof is conclusive that plaintiffs were unable to perform.

McDorman v. Moody (1942) 50 Cal. App.
(2d) 136.

7. The District Court failed correctly to apply the law in allowing prospective damages for loss of expected profits where the evidence shows plaintiffs' business was a new and unestablished venture.

Calif. Press Mfg. Co. v. Stafford Packing
(1923) 192 Cal. 479.

25 C. J. S. 519.

Hartley v. Weller (1951) 104 Cal. App. (2d)
118.

8. The District Court is in error in awarding prospective damages when plaintiffs failed to adduce the best available proof of profits and relied on guesswork rather than actual facts known to and in the possession of plaintiffs.

Schmitt v. Continental-Diamond Fibre Co.
(CC 7th 1940) 116 F. (2d) 779.

Stephany v. Hunt Bros. (1923) 62 Cal. App.
638.

Allen v. Gardner (1954) 126 Cal. App. (2d)
335 at 342.

Austin v. Roberts (1933) 130 Cal. App. 328
at 333.

9. The District Court is in error in awarding damages when plaintiffs failed to offer evidence of expense of doing business.

Skupen v. Imperial Irrig. Dist. (1939) 33
Cal. App. (2d) 392.

15 Amer. Juris. page 574.

Ellerson v. Grove (CC 4th 1930) 44 Fed.
(2d) 493 at 499.

Central Coal & Coke Co. v. Hartman (CC
8th) 111 Fed. 96.

Alexander Dept. Stores v. Ohrbachs (1945)
56 N. Y. S. (2d) 173 at 182.

III.

Additional Points upon which Appellant relies in the appeal from the Judgment of the District Court in favor of Appellee and from the Judgment in favor of Appellant.

The Findings of the District Court are erroneous in that:

(a) Finding I fails to find that there was a limited partner in the partnership.

(b) Finding III is in error in finding anything other than that plaintiffs were jobbers. There is no evidence that plaintiffs were "representatives or agents." There is no evidence that plaintiffs were

to receive any "compensation." Without contradiction, the evidence shows that plaintiffs were authorized to buy products from defendant and resell at any price they choose and that this was the whole arrangement between them.

(c) The findings are silent on a material issue, i.e. the absence of any duty on plaintiffs to purchase any specified or minimum amount of goods. This is a material fact, relevant to the question of mutuality. The pleadings and proof are only that plaintiffs would "promote the sales" of defendant's products. Finding III, that plaintiffs agreed to perform the duties and obligations of exclusive military service jobbers, is clearly erroneous—there is no evidence of what such duties and obligations are and no evidence that such duties and obligations were ever discussed.

(d) There is no finding that the type of business undertaken by plaintiffs for defendant was a new business for plaintiffs. This is material on the issue of loss of future profits.

(e) There is no finding that plaintiffs were at all times free to and did engage in other business. This is material on the issue of damages, and on issue of mutuality and on the issue of estoppel to plead the Statute of Frauds.

(f) Finding V omits to find that plaintiffs' brokerage business increased and that his bidding business for others was substantial during the period they were Hunt's jobber. The evidence does

not show that plaintiffs actually reduced their bidding business as a result of the work on Hunt products.

(g) The findings fail to state that no executive officer knew of any of the terms of an agreement such as found by the trial court. Without such a finding, the defendant cannot be bound by such a contract. The evidence shows no executive officer had any knowledge of such a contract as that found by the court.

(h) The findings (VI and VII) fail to state that plaintiffs were in default, unable to pay, and would be unable to continue to purchase Hunt products for lack of funds and that lack of funds was not caused by defendant.

(i) There is no evidence to support any finding (VIII) that plaintiffs' business credit was damaged, nor any evidence that plaintiffs ever had business credit.

(j) The finding (IX) that defendant approved and consented to plaintiffs' plans is without any support in the evidence. The evidence shows, without contradiction, that no officer of Hunts ever knew of any arrangement such as that claimed by plaintiffs.

(k) There is no finding of what was a "reasonable period of time" mentioned in finding X.

(l) Finding XII completely omits any reference to interest due on the trade acceptances and to the provision therein for attorney fees.

(m) The Findings of Fact, set forth by the District Court are clearly erroneous because they are against the clear weight of the evidence.

(n) The District Court erred in not finding the facts set forth in Defendant's Proposed Modification to Findings of Fact.

(o) The District Court erred in that its decision herein is contrary to the applicable decisions of the Courts of Appeal of the United States, and the decisions of the Courts of the State of California.

Dated: June 26, 1956.

/s/ VINCENT CULLINAN,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 27, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34,288

WELLINGTON PHILLIPS and H. W. LIHOLM,

Plaintiffs,

vs.

HUNT FOODS, INC.,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

November 28, 1955

Appearances:

For the Plaintiff:

Messrs. HANCOCK, ELKINGTON &
ROTHERT, by
HARLOW P. ROTHERT, ESQ.,

For the Defendant:

Messrs. CUSHING, CULLINAN,
DUNIWAY & GORRILL, by
VINCENT CULLINAN, ESQ.

* * *

The Clerk: Phillips, et al., vs. Hunt Foods, for jury trial.

Mr. Rothert: Ready.

Mr. Cullinan: That is ready.

The Court: Call the roll of the jurors.

Mr. Rothert: If your Honor please, I represent the plaintiffs and have conferred with the attorney for the defendant, and we are willing at this stage to waive the jury and let the matter be decided by your Honor as a trial without a jury. I understand that Mr. Cullinan, representing the defendant, doesn't wish to ask for a jury if we waive it.

Mr. Cullinan: We did not request the jury in the first place. I think it is a case that should be tried by the Court without a jury.

The Court: You wish to waive the jury?

Mr. Rothert: Yes, your Honor.

The Court: Of course, you will have to pay the jury fees for today because we summoned the jury

especially for this case, because there is no need for a jury otherwise.

Mr. Rothert: I understand that. We felt that it would be a saving to the government to waive the jury if we are willing to have the matter heard as a court trial by your Honor instead of having the jury attend for several days.

The Court: Well——

Mr. Rothert: Although the waiver comes late. In other [3*] words, we felt that it was better late than never if we were going to waive the jury.

The Court: Perhaps that is right. It doesn't make any difference to me whether the case goes before the Court or a jury; but we did summon this jury especially for this case and we have no other place to use them. There is another panel summoned for another judge. If the Court had been notified in time for the Clerk to send out notices—in fact, even if we had been notified in time to telephone the jurors as we sometimes do, it would have saved that expense.

Mr. Rothert: The parties don't know until the morning the case is supposed to start, in which departments it might be assigned; and we didn't feel we were in a position to waive the jury until this morning, your Honor.

The Court: Well, we will have to adjust that matter later, but the cost of this panel will have to be assessed. We will leave the decision as to how that is to be done until later in the case.

Mr. Rothert: Yes, your Honor.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Call the roll of the jurors so we can see who is here.

(The clerk, thereupon, called the roll of the jury and announced that 22 jurors were present.)

The Court: Members of the jury panel, your services are not going to be needed in this courtroom; but it may be [4] possible that a criminal case that is proceeding before Judge Harris—in a criminal case before Judge Harris, some of you may be needed, so I will ask you to remain here in this courtroom for a short time and we will let you know. In the meantime, you can amuse yourselves by listening to the proceedings that are going on here, and whatever jurors are needed in the other department will be credited to the account, as it were.

Mr. Rothert: Yes, your Honor.

The Court: Proceed.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Rothert: Mr. Harlow P. Rothert of the firm of Hancock, Elkington & Rothert, appearing for the plaintiffs.

Mr. Cullinan: I am Vincent Cullinan of the firm of Cushing, Cullinan, Duniway & Gorrill, appearing as attorney for the defendant, Hunt Foods.

Opening Statement on Behalf of Plaintiffs

Mr. Rothert: Your Honor, this is a case involving the breach of an oral contract and seeking damages for that breach. I think some of the facts are so unusual that it may assist the Court if I make

a rather detailed statement of what we intend to prove on the part of the plaintiffs in this case.

I believe the evidence will show that Mr. Phillips, one of the two plaintiffs who are partners in a firm called L. Wellington Phillips Company, was all his life in the grocery [5] and food business; that he worked for many years for Safeway Stores in various capacities—as a salesman, in the warehouse operations, buyer, and as a man in charge of several of Safeway Store's large super-markets; also he was employed by Libby, McNeill & Libby in the food business for several years.

Shortly after World War II, he was associated for a time with John Rothschild Company, which is a jobbing and brokerage firm specializing in sales to the military forces, primarily on the basis of bidding to the government for sale to the army, navy, Marine Corps and other branches of the service. And in that connection, Mr. Phillips acquired experience and knowledge concerning the military buying of items including food products.

In 1950, Mr. Phillips and Mr. Liholm started the plaintiff partnership and started up a business essentially in the bidding for government food purchase contracts, and were in that business for about a year prior to the making of the oral contract involved in this case.

In that year's business or year's business they had earned a profit and later reports indicated that for the year 1951 they earned about \$15,000 profit in their first year's business in the bidding for government purchase contracts essentially in food items.

In August and September of 1951 the evidence will show that a Mr. Flynn, who was manager of the district sales for [6] Hunt Foods, Inc., in Northern California, contacted Mr. Phillips and asked him to come over and talk to him about possibly handling the sales of Hunt Food lines through the commissary stores and military bases in Northern California.

Without going into details of the alleged conversations and agreement, I will state that we believe the evidence will prove that in the subsequent discussions between Mr. Phillips and Mr. Flynn of the Hunt Foods Company, the local district manager, and with Mr. Miller, who was the division manager, sort of like a sales manager for the entire United States with headquarters in Fullerton, California, the home offices—in those discussions, an oral agreement was reached in which Hunt Brothers authorized the plaintiffs to act as the exclusive jobber for the sales of Hunt Food Products to the military bases and commissary stores in Northern California, and in the agreement, Mr. Phillips agreed that he would not represent any other competing lines in the sales to these stores and at the military bases; that he would promote and diligently further the sales of Hunt Lines in these stores; and that he would be so authorized for a period of at least ten years.

The evidence will show that Mr. Phillips advised the defendant that in order to take on this assignment he would have to abandon, or substantially

abandon, his bidding business, which had been profitable and was growing, because he couldn't [7] have the time himself to promote the sales of Hunt Foods and also maintain the bidding business.

Also, the evidence will show that he advised Hunt Foods, and Hunt Foods well knew, that for a period of time, which Mr. Phillips estimated and stated would be approximately two years, he would have to handle the sale of Hunt Food Products without a profit and possibly at a loss in order to promote the sales of Hunt Food products to these military bases.

The evidence will show that one of the reasons for that situation was that the salesman for Hunt Foods, Inc., had previously been selling their products direct to these commissary stores and had established a price list with them and that the prices at which Hunt Foods was going to sell its products to Phillips which in turn would be resold to the commissary stores was substantially the same price that the commissary stores had previously been paying for the Hunt products; that Mr. Phillips informed them that there would be a period of time before he could create for himself a profit margin on the resale of Hunt items to these commissary stores.

The evidence will show that at that time and basically at nearly all times the Hunt Foods line is priced below the price of its competitors, but that there is a margin of difference in the price which would permit an increase in the price of Hunt products to the commissary stores and still stay underneath

or not in excess of the price of the competing [8] lines.

The evidence will show that in the arrangement the Hunt Foods salesman would receive credit for all sales made by Mr. Phillips' partnership to these commissary stores; that the salesman for Hunt Foods would be relieved of the necessity of making those calls and could concentrate on other business of the grocery stores, super-markets and other business.

The evidence will show that Mr. Phillips advised Mr. Flynn and Mr. Miller of Hunt Foods that in view of the fact that it would be a losing proposition for him for about two years and that when he succeeded in increasing the volume and creating a profitable margin for himself, it would take him two or three more years after that to make up for the initial period without profit and that he wouldn't want to give up his existing profitable business unless he could be assured that he would have the authorization and the line for ten years, and that he was advised by defendant's representatives that he could count on having this agreement for a ten year period, or even longer if he succeeded in successfully carrying out the arrangement.

The evidence will show that Mr. Phillips entered into the promotion of these sales and the buying of Hunt products for resale to the commissary stores about the first of December, 1951. At that time the Hunt Foods Company issued a written memorandum which they distributed to the commissary [9] stores advising them that L. W. Phillips Company

was the exclusive military jobber on sales to the commissary stores on military bases in this area.

The evidence will show that during the period of about fourteen or fifteen or sixteen months Mr. Phillips was allowed to carry out this program, the volume of sales of Hunt Food products to the military stores and bases substantially increased; that he was able to develop a profit margin from about one per cent to about nine per cent on the average in that period of time; that he succeeded in getting numerous Hunt canned food items into the commissary stores where they had not been placed before; that he had just gotten to the point where two of the large military bases had decided to let the entire Hunt Food line come into the store and be sold there where they had not been sold before; that the assistant sales manager for this district, a Mr. Steiger, had made a trip with Mr. Phillips in April of 1953 to see what was going on and wrote letters indicating their entire satisfaction with the performance, improvements and business being done by the plaintiffs on the resale of these Hunt items.

The evidence will show that during that period of time plaintiffs did abandon, substantially abandon their bidding business, so that at the time of the termination of this arrangement the amount of bidding for government contracts that they had was down to 20 per cent of the amount that [10] they had had before the Hunt line was taken on.

There will be evidence here, your Honor, explaining the difference here between the bidding business and the matter of selling to the commissary stores

and military bases. A person bidding for government military purchases places a bid at a certain place with the government purchasing office, and if that bid is accepted he has a contract. He has to have definite commitments and either own the products that he has made a bid on or have credit sufficient to have definite commitments so that he is in a position to supply the products if the bid is accepted.

The evidence will show that these bids must be acted upon quickly; that only a person with the type of experience that Mr. Phillips had who knows the sources of supplies of various food items and the pricing and all that can successfully carry on a bidding business, and that it was impossible for Mr. Phillips to diligently promote the sale of Hunt lines under this arrangement and also pay attention to the bidding business.

The evidence will show that at the time in late April, 1953, Mr. Phillips was notified by Mr. Steiger, the assistant sales manager for Hunt Foods in this district, that Mr. Phillips could no longer sell the Hunt lines to the commissary stores.

The evidence will show that prior to that Mr. Phillips [11] had run into rumors that there was going to be a change and that these rumors in the industry had caused him to lose a certain amount of business that he otherwise would have received in the early part of 1953, the business of selling Hunt Foods to these military stores.

The evidence will show that this termination of the arrangement with Mr. Phillips was the result of

an agreement that Hunt Food Products made with a nation-wide concern named Francois L. Schwarz & Company to handle the sales of all Hunt Food products to all the military bases and commissary stores in the United States and possibly on an international scale.

The evidence will show that the arrangement that Hunt Foods had with Phillips in this particular district was unique and there was no other similar arrangement that Hunt Foods had in other areas of the country.

I believe the evidence will show that the reason why Phillips had to go was that the company had made a larger and different arrangement with a nation-wide concern which conflicted with the arrangement that had been made with Phillips.

The evidence will show that following the termination, in April, 1953, Phillips attempted to return to the bidding business; that he was unsuccessful, was unable to earn a profit, and that he lost money for the year 1953; that he did not have any credit with which to borrow funds to finance the [12] bidding business; that he did not have any capital because of the expensive promotion for a year and a half of Hunt sales without profits, and actually at a loss because of the expense of promoting a line, and that he was unable to successfully renew his bidding business and has been strapped in his business because of his financial problems and loss of money.

On the issue of damages we will prove in view of the progress made by Mr. Phillips during the year

and a half that he was allowed to work in the performance of this contract, the profit margin that he had been able to create in the sale of these items, the increase in volume, that he could have earned in the subsequent years a net income of \$10,000 a year in the very next year, and in the next two years following, the third year, 30 to 35 thousand dollars net, and in the last five years of the ten-year period, a substantial sum in excess of that \$35,000, which I have stated were the estimated profits of the third, fourth and fifth years of the ten-year period.

It is plaintiffs' position that although this is an oral contract which cannot be performed with one year and which would appear on its face to be subject to the statute of frauds, that the promises of the defendant relied upon by the plaintiff resulted in the plaintiff changing his position and abandoning his former profitable business and the impairment of his capital and the damaging of his credit to the point [13] where the defendant is estopped to defend against the breach of contract on the ground of the statute of fraud. That point was argued and briefed and decided by Judge Harris on a motion to dismiss.

For your Honor's information, also, the defendant has cross-complained in this case for a sum of money which plaintiff owed to the defendant for canned goods items purchased and not paid for, and in our answer to that cross-complaint we have admitted that the amounts are unpaid for, and there is no issue that they represent products purchased by the plaintiff, which have never been paid for to date.

The evidence will show that at the time of the termination the plaintiffs were unable to pay for those products and remain in business at all, and were faced with the choice of either quitting business altogether and using what assets they had for the discharge of their debts or in letting the Hunt account extend for a period of time in the hope that they could recover from this termination and eventually pay them off in full.

The evidence will also show that following the termination in the succeeding few months, representatives of Hunt Foods told Mr. Phillips that there was a good chance that he could get this arrangement back, but that getting it back never materialized.

The questions of the margin of profit on the resale of [14] Hunt lines and why there was opportunity to purchase and resell the Hunt products at a profit are somewhat technical, based on peculiar pricing and other factors in the canned food business which will be brought out by the testimony. I think it would probably be confusing to go into that part of it in detail in an opening statement.

Opening Statement on Behalf of Defendant

Mr. Cullinan: If your Honor please, the evidence will show that in 1951, Mr. Phillips came to Hunt Foods asking if they would take him on as a broker. They told him they wouldn't do so.

The evidence will show that then in the fall of 1951, the parties agreed to the ordinary jobber type of arrangement, nothing said about ten years, noth-

ing said about irrevocable contract. It was the ordinary kind of jobber arrangement wherein either party could terminate at any time. He was just a customer of Hunt Foods in the Northern California area buying our products and reselling them to government commissaries.

At the time he agreed that he would pay for all purchases on a ten day, two per cent discount; he was to pay us ten days after he was invoiced.

The evidence will show that for the first month, about the month of December of '51, he so paid; at ten days from billing, he paid us. We gave him a limited line of credit of \$2,000, but he gradually, from January of '52 on, started to [15] ignore that ten day payment basis until, as a matter of fact, at the time of the termination, as the evidence will show, he was more than four months behind in his payments to Hunt Foods.

In May of 1952, the evidence will show that his indebtedness had mounted up considerably and that, as a protection for us, he assigned to us certain accounts; that under the assignment the monies collected on these accounts were to be held by him as trustee for us and paid to us, and the evidence will show that he didn't do that.

In April, 1953, we decided, as we had a right to do, to terminate this arrangement with Mr. Phillips. He then owed us about \$25,000.

Phillips did not at the time of termination claim that he had any contract with Hunt Foods Company. In fact, his first claim of a contract with us was made about a year later subsequent to the death of

Mr. Flynn, with whom he claims to have made the contract. And between the termination in April, 1953, and the early part of 1954, there are innumerable letters which will be introduced in evidence, between the parties, and in none of these letters did Mr. Phillips claim that he had a contract; in virtually all of these letters he is explaining how he hopes to pay us off; that we won't lose a dime; or explaining why he wasn't able to keep promises made in preceding letters. But in none of those did he claim any [16] contract. And after the termination he consistently and readily admitted his indebtedness to us and thanked us for our leniency in not pressing him too hard.

The termination was in the latter part of April of '53. In July of '53, in order to help him out——

The Court: That is not quite clear to me, Mr. Cullinan. What do you mean by "termination"?

Mr. Cullinan: Well, we told him that we were no longer going to sell to him; he was no longer going to be our jobber to sell to military bases; we had somebody else.

The Court: Was there an issue as to whether or not there was an oral agreement by which Hunt Foods was to market through Phillips, or were to sell through Phillips, or were to sell to Phillips exclusively for resale to the military?

Mr. Cullinan: No; there is no issue on that. There is no issue to the fact that we said to Phillips, "You can be our exclusive jobber to sell these military establishments." But as far as the ten years, that we couldn't terminate it or he couldn't termi-

nate it; no such oral agreement is involved, according to the evidence that we will show. The plaintiff, of course, claims that he had a ten-year oral contract.

The jobber arrangement was terminated in April of 1953. He then owed some \$25,000. In July of 1953 the balance was down to \$22,198.95. Then we had him give us five trade acceptances, payable at stated times. The first two were actually [17] paid off. The last three were due, respectively, October 1st, 1953, November 1st, 1953 and December 1st, 1953. Each of these is in the sum of \$4,434.79. On the trade acceptance due October 1st, 1953, he paid some part of it. There is still \$2,615.55 left on that trade acceptance. And on the other two, due respectively November 1st, '53, and December 1st, '53, nothing has been paid on those trade acceptances. They are pleaded in the cross-complaint and admitted in the answer.

So the evidence here, briefly, will show that the whole idea of a contract developed in the plaintiff's mind after our numerous attempts to work out the payment of his indebtedness to us. We told him that we were going to place it in the hands of an attorney, and that was more than a year after the termination, and that was the first time that he claimed he had any kind of a contract. The first claim was that he had a written contract, and he was asked to produce the contract, as the evidence will show, and he failed, of course, to produce any contract; and that in many of the discussions when he first claimed the contract, the credit manager of

Hunt's, the evidence will show, said, "Let us scotch this matter of a contract; come and tell us what is the contract." And thereafter the correspondence of Mr. Phillips has nothing to say about the contract but only about how he is going to liquidate the indebtedness to us. And we submit that the evidence will not show any basis for an estoppel to plead the [18] statute of fraud in this case.

The Court: Is there any issue, so far as you are concerned, as to any period of time for which this arrangement was to continue?

Mr. Cullinan: Well, yes, your Honor; we say that that arrangement could have been terminated the next day or the next month or at any time by either party, and that is the usual jobber arrangement, and that is what we had with Mr. Phillips.

The Court: What was the advantage to Hunt Bros. to have him act exclusively in the sale of its products to the military?

Mr. Cullinan: The only advantage to Hunt's was that if you have a man to whom you are selling, he is a customer, he is going to resell to the government commissaries, resell your products to the government commissaries—your salesmen don't have to call on the government commissaries and make them work another client.

The Court: That is an advantage?

Mr. Cullinan: That is the only advantage, as we see it.

The Court: The only advantage? [19]

Mr. Cullinan: Whether the evidence will show it was an advantage to us or not—well, the evidence

will show whether it was or was not, but that would be the only reason for appointing a jobber to handle the distribution. His distribution was limited to certain specified commissaries in Northern California.

The Court: You say that you terminated this arrangement because it was terminable at all or because of a breach on the part of the plaintiff in failing to pay?

Mr. Cullinan: We say this, your Honor: We say, first, we have the right to terminate this at any time. Number two, assuming that he could establish that there was such a contract—I am assuming; I do not say that I believe there is the faintest possibility he could—but assuming something, he obviously breached the contracts in not making the payments he was to make. In fact, he did not make the payments he was to make under our arrangement.

The Court: Was the termination of your contract done in writing?

Mr. Cullinan: No.

The Court: Or was that oral, too?

Mr. Cullinan: That was oral, too, but two of our men met with them and said, "We are no longer going to sell to you. We are going to sell to someone else."

The Court: Do you want to go ahead with your evidence? [20]

Mr. Rothert: Yes, your Honor, Mr. Phillips.

L. W. PHILLIPS

called as a witness on behalf of the plaintiffs;
sworn.

Q. (By the Clerk): Will you please state your
name to the Court? A. L. W. Phillips.

Direct Examination

By Mr. Rothert:

Q. Where do you live, Mr. Phillips?

A. 503 MacArthur Drive in Colma.

Q. What is your business at this time?

A. Food business, wholesale food business and
brokerage.

Q. Are you at the present time in any firm or
in business for yourself?

A. L. W. Phillips Company, the same as before.

Q. What type of organization is L. W. Phillips
Company? A. They are a food——

Q. I mean, is it a corporation, a partnership——

A. Partnership.

Q. Who are the partners in that company?

A. Mr. Lee Holm and oversees finance and trad-
ing as a limited partner.

Q. Was that partnership in existence in the
year 1951? A. Yes, sir.

Q. Has it been in existence at all times since
1951. A. That is right. [21]

Q. I will show you a copy of affidavit of publi-
cation——

The Court: Is there any need to go into that,
Counsel?

Mr. Cullinan: No, your Honor. We stipulate

(Testimony of L. W. Phillips.)

that the partnership was formed on whatever date the document bears.

Mr. Rothert: The publication in the Recorder was on September 24th, 1951. The notary's certificate on the certificate of partnership is dated April 12th, 1951.

Mr. Cullinan: We will stipulate to that. There is no issue as to the partnership formation.

Q. (By Mr. Rothert): Will you state for the Court, Mr. Phillips, what your business background is, what lines of business you have been in, and what experience you have had?

A. I have been in the food business all of my life since 1928, I believe, or 1925. I went to work for a wholesale grocery house in San Diego, and went from there to Libby, McNeill & Libby as a salesman about 1926 and remained with Libby as a salesman and later district manager until 1935, and in 1935 I was employed by Western States Wholesale Grocery Company, which was a subsidiary of Safeway Stores, as a salesman in Fresno.

Q. Excuse me, Mr. Phillips. Before you go on, you say you were district manager for Libby, McNeill & Libby for a while?

A. Southern California, San Diego.

Q. Is that manager of sales?

A. Yes, sir, with seven salesmen, and then in 1938 I was made [22] warehouse manager in San Jose, and in the same year I was transferred to Eureka as a warehouse manager and buyer and sales manager. In 1941 I was made a zone retail operations manager of Safeway Stores.

(Testimony of L. W. Phillips.)

Q. In what zone?

A. In Northern California zone, and in charge of buying, selling and promoting of food items in super markets.

In the interim year there in 1939 I was in the analytical department of Safeway Stores, inventory control, and so forth, in Oakland. In 1948 I left Safeway Stores and went to work as sales manager due to the fact that they closed the zone in Northern California. I went to work as sales manager of Lang & Strowe Company here, a food brokerage house. In the last of 1948, I believe it was, I went to work as buyer and manager of John Rothchild and Company, an exclusive military bidding job, and in 1950, about September, we actively started the same kind of concern at 915 Bryant Street.

Q. When you say the same type of concern, you mean selling material on bidding?

A. Government bidding, that is right.

Q. Were you familiar with the Hunt Food Products line prior to the arrangement that you had with Hunts in 1951?

A. Yes, sir, I had known Hunt's line and bought it for Safeway Stores and Western States Wholesale Grocery Company from its instigation. I believe Hunt first came on the market [23] about 1945 or 1946. The Hunt personnel that we knew here in the case of Mr. Flynn and some of the other personnel I believe were—I knew him part of that time, of course, with the CHB Company, whom

(Testimony of L. W. Phillips.)

Hunt bought out, a pickle concern. Mr. Flynn was the salesman or sales manager of some type during those years, and we used to buy CHB pickles from him. I knew Mr. Flynn for——

Q. I just asked you about the type of business of the L. W. Phillips Company.

A. You mean did we buy Hunt's products?

Q. No, you have answered the question. When did you first have any contact with a representative of Hunt Foods about the subject of your selling the Hunt line to the commissary stores?

A. We had the first contact with Hunt Foods about the commissary stores in August, some time in early August, if I remember.

Q. Of what year? A. 1951.

Q. What results had you had up to that time in your bidding business of the partnership?

A. Our bidding business started actively in October of 1950, I would say the 1st of October, and for the months of October, November and December, 1950, our net was \$1,950, and rather successful, the first three months in operation. And then up [24] to the time that we talked to Hunt or they talked to us in 1951 our bidding business had increased, I think our records will show, about 200 per cent over our first quarter of 1951, and our profits, of which we kept a running record, were substantial to the point where we figured by August or September, 1951——

Mr. Cullinan: Just a minute. If your Honor please, as to what he figured or guessed, I submit

(Testimony of L. W. Phillips.)

that that is pure hearsay, that the books would be the best evidence of whatever the profit was up to this point.

The Court: I will sustain the objection.

Q. (By Mr. Rothert): For the year 1951, what was the result of the partnership's business as far as profit or loss was concerned?

A. For the year 1951?

Q. Yes.

A. The year 1951 showed a net of approximately \$15,000, besides the \$5,000 that I drew, which would be about \$20,000 net past expenses.

Q. This bidding business that you refer to, will you explain to the Court what type of operation the bidding business is?

A. The bidding business is the bidding on food items and similar items in the food field, the grocery field, which items are to be used by the troops or by the soldiers and the sailors as subsistence. You bid on that according to specification [25] and not according to brand. They ask for a thousand cases of tomatoes and ask for a certain kind and you bid that price against all other bidders, of which there are many.

Q. You say ask for tomatoes of a certain kind. What do you mean by tomatoes of a certain kind?

A. Certain type. They would ask for a choice tomato, fancy tomato, or tomato puree. They would not ask for a brand, and that bidding would cover the entire food field which would, of course, include everything in the food store, everything that was

(Testimony of L. W. Phillips.)

used including soups and shortenings of every type that could be used.

Q. Were the items purchased by the government on the bidding business the same or different than the items sold to the commissary stores?

A. They would be different items. The commissary store items are bought for resale, and at certain times some resale items are used in emergency by the troops. That has been done. But the regulation states that no one can specify a brand of merchandise to be bought with subsistence money. It has to be specified by specification. You can't ask for any brand if you are going to expend it without a return of money.

Q. When you say subsistence, do you mean that the military troops keep——

A. That is right, they eat that without return of money. I might explain the financial set-up of the government as a [26] matter of information. There are two sets of money, you might say. One money is allocated by Congress for the benefit of feeding of the troops and subsistence. Another bunch of money is loaned to the commissary stores to buy merchandise and resell to the personnel, and that money is returnable.

Q. What did you do in your business, the bidding business? What would you have to do and what did you do to make a bid on a government purchase?

A. Well, it is quite an intricate affair. One thing

(Testimony of L. W. Phillips.)

you must know in the food business if you are going to bid on—we will take an item of tomatoes. We were just talking about that. Suppose that the Navy asks for a thousand cases, and they generally ask for it in pounds, which is more confusing than ever—they would say, “We want so many pounds of an item”—you would have to know the specification. If they asked for Type 2, and so on, that would mean a certain type, a standard grade—that would mean a standard grade of tomatoes approved by the Department of Agriculture. You would have to know what packer had that type of tomato. You would have to know whether that type of tomato would pass the federal inspections, which is handled here in San Francisco. You would have to know what price the last bid was. You would have to know if you could get delivery. And you have to know your cost of packing or special marking or anything that would apply to that particular item. You would have to also [27] control that item, either by money or an option with a credit line back of it, or have it in your warehouse ready for delivery and, as a rule, those items were asked for and you would have to answer those bids you are working on within a period of 72 hours or less, and delivery would have to be made probably within two or three weeks and completed.

Q. Were these bids always on just one item to be purchased?

A. No, these bids covered hundreds of items, anything that you could find that anyone would

(Testimony of L. W. Phillips.)

need in a restaurant as a food item, that bid would cover that item—anything that is eaten at the table or used around as soap, shortenings, and so forth.

Q. How did you ascertain the source of products upon which you would bid and the price and delivery specifications and other factors involved?

A. We will take tomatoes again as an example, since we have been talking about that. There are about 28 tomato packers in Northern California. We would have to contact those people to determine the availability, and if they were under government inspection, which is another factor, and we would have to determine the price and put an option on it with a payment or control of some type, and from that we made our bid.

Q. Who handled the bidding business in your partnership in the year 1951? A. I did. [28]

Q. (By Mr. Rothert): Mr. Phillips, when you made this survey of the grocery stores, what did you find the situation was as to whether the Hunt products were being sold in the commissary stores at that time?

A. We found, or I found Hunt items in a few stores, in scattering amounts, scattering items and that they were selling very well.

Q. How many separate items in the canned food line did Hunt's have for sale at that time?

A. Items and sizes, I believe around a hundred—items and sizes.

Q. Now, how did the prices of Hunt's products at that time compare to prices of other brands or

(Testimony of L. W. Phillips.)

other lines? A. In the commissary stores?

Q. Yes. A. Resale prices?

Q. Yes.

A. The prices on the shelf in commissary stores of other items, other brands, such as the brands they had, which was Wellman, S & W, Trupak, Sunblest, and Del Monte and Libby, we found, in not all commissaries, but in different commissaries we found those items, and Hunt's would be under those in the commissary stores about 25 per cent.

Q. After you made this survey, did you talk to anybody with Hunt Foods again about this subject? [29] A. Yes.

Q. Who did you talk to next?

A. Mr. Flynn in early September.

Q. And who was present when you talked to him?

A. Mr. Flynn and Mr. David L. Mears and myself.

Q. Who is Mr. David L. Mears?

A. Mr. David L. Mears was at that time a broker or salesman to these different super-markets and restaurants and so forth, selling canned goods. He used to call on us and he was in our office the day I went over.

Q. When you say super-markets you weren't referring to commissary stores?

A. No, no, not referring to commissary stores.

Q. How did he happen to be present when you were talking to Mr. Flynn?

(Testimony of L. W. Phillips.)

A. When I got ready to leave the office, I said, "Dave,"——

The Court: No; how did he come to be present?

A. Well he went with me to see Hunt Foods about canned goods.

Q. (By Mr. Rothert): Did he have anything to do with your business at that time?

A. At that time, no.

Q. Did he have any interest in this subject of your handling Hunt's sales to commissary stores?

A. No. [30]

Q. All right. Now, will you tell the Court what the conversation was in that discussion in early September with Mr. Flynn?

A. I told Mr. Flynn that we were interested in the Hunt line under these conditions: that we knew from the survey that it would ultimately be profitable, but at the present time the price lists in the commissary stores were at practically our cost; we couldn't go in and raise those prices at all because the customer would quit. The only chance we had of making any money on that list he had in those stores was for the market to go up or down, and that I knew that the market, as a rule, moved around during the canning season, which would be the next April, May, June and July. As merchandise is canned, it fluctuates up and down according to what is on hand or what is packed. That we would have to abide by that low price, at cost or below cost, as far as we were concerned, which of course would include our cost of doing business;

(Testimony of L. W. Phillips.)

when I said cost, I meant cost of doing business; that we would have to cut down on our bidding business, reduce it drastically because it was going to take lots of time to sell these commissary stores, and that he knew the time element involved because his men had been calling there.

Mr. Cullinan: If your Honor please, I move to strike what——

Mr. Rothert: What he knew. [31]

Mr. Cullinan: ——that part of the answer that relates to what Mr. Flynn knew.

The Court: It is not clear to me whether the witness said whether he, Flynn, knew this or whether it was his statement.

Mr. Rothert: If I may make a statement to the witness, because I think it throws him off his own track—don't explain things as you are telling us conversations; just limit yourself to what was said. Don't tell us that Mr. Flynn knew something unless you said that he knew it, and don't explain that the packing season changes in April, May, June and July unless that was actually said in the conversation and that was actually in the conversation.

The Court: Go ahead then.

Q. (By Mr. Rothert): Go ahead and tell us further about what this conversation was.

A. And I told Flynn that we at the present time were—had been in contact with Libby, another canned goods packer, to handle their line since I had worked with Libby for seven or eight years and

(Testimony of L. W. Phillips.)

knew their personnel there, but that they had not given us any answer, they were slow in answering us on some kind of a plan which we had with them; that I would be interested in taking Hunt's line if we could have it for a maximum—or a minimum, rather—of ten years, and this being our thinking to Flynn—we told Flynn that it would take us [32] two or three years to get the line up to a profitable basis over our cost of doing business due to the conditions in which it was in in the stores at that time; that it would take us another two or three years to get back a profit on our first two or two and a half years' operations, and that unless we could have it for another five years, we didn't want it at all; that we had a very profitable business, bidding business; that we would make that year between fifteen and twenty thousand dollars; that I would have to give up the bidding business because I didn't have personnel to handle it; that I would have to make the personal calls on the commissary stores myself.

Mr. Flynn said, "Well, Phillips, our trouble with the commissary stores is the fact that our salesmen are held up in there by the hour; they are never there on time; we continually have price troubles; we continually have kicks from our customers that we are selling the commissary stores too cheap and they hear about it from a commissary buyer going and telling them. We want you to take this to eliminate that trouble, and if you will, you can not only

(Testimony of L. W. Phillips.)

have it for ten years but you can have it for as long as you are able to work it."

I said, "That's fine. We will send you a letter making this appointment."

Q. In that conversation was there anything said about [33] whether their salesmen would continue to call on the commissary stores?

A. The plan was made between Mr. Flynn and I that his sales force would not call upon the commissary stores.

Mr. Cullinan: Just a minute, please. If your Honor please, he is stating a conclusion. The question is what was said.

The Court: Yes; just what was said. What did he say and what did he say?

A. I said to Mr. Flynn, "Well, Howard, I understand a salesman's feeling towards an account. Some of your men have been calling on these stores and I would like for them to get credit for our sales." He said, "That they will do. Our sales force will get credit for your sales in the commissary stores so that it will eliminate the friction that could arise when a salesman goes into a territory or is working in a credit because that credit of so many points on our sales goes to the benefit of their sales force."

Q. (By Mr. Rothert): In that conversation was there any mention made of your handling of other lines of canned good products?

A. They told me that I——

Mr. Cullinan: If your Honor please, I would

(Testimony of L. W. Phillips.)

suggest that rather than leading the witness, he ask him what the conversation was without asking him whether something was said [34] about this or that or the other; I think the witness should testify to the whole conversation.

The Court: Well, if it is an involved, long conversation, I never see any objection to referring to a general subject matter as long as the question is not leading, except the witness didn't answer the question. He talked about some plan being made. The question was what was said on the subject of your handling other lines.

Mr. Rothert: Other brands of canned food products.

The Court: Of canned foods.

A. Mr. Flynn said, "It is specifically understood that you will handle our Hunt lines exclusively, and not Libby or Del Monte or any other line."

And I said, "That's our understanding also. We will handle the Hunt line exclusively to the commissary stores."

Q. (By Mr. Rothert): Was there anything said about what territory you would work in on the proposed sales?

A. At that time we had—I will tell you why that was said.

Mr. Rothert: No.

The Court: No. Just state what was said.

A. Well, he said to us, "Could you handle the 11 western states?" And I said, "No, it is too much of a job; we don't have the personnel and we can't

(Testimony of L. W. Phillips.)

do it. We will take Northern California in your territory." And that included all the military bases north of the Kern County line, the [35] southernmost one being Camp Cook at Lompoc, that is the nearest south of San Luis Obispo, and the northernmost base being Beale at Marysville.

Q. What, if anything, did Mr. Flynn say about the territory? A. How is that again?

Q. What, if anything, did Mr. Flynn say about this northern California territory?

A. He said that is the territory we could have.

Q. After that conversation with Mr. Flynn, what did you do next in preparation for this handling of Hunt's sales?

A. What was the next move we made after that?

Q. Yes.

A. At Mr. Flynn's instructions we went to Los Angeles and reported to Mr. Miller.

Q. All right. When did Mr. Flynn instruct you to go to Mr. Miller?

A. Immediately at the conclusion of our conversation that we just talked about.

Q. All right. Did you go to see Mr. Miller?

A. I did.

Q. When?

A. About the 9th of September, if I remember; about that time.

Q. And how long after your conversation with Flynn was it that you went to see Mr. Miller? [36]

A. I would say it was three or four days or five

(Testimony of L. W. Phillips.)

days; it depends on how the weekends fell there. It might have been a week.

Q. And when you talked to Mr. Miller, was there anyone else present?

A. I talked to Mr. Miller in his office at that time.

Q. Was anyone else in his office at that time?

A. No, not as I remember.

Q. What was the conversation you had with Mr. Miller on about the 9th of September down in Fullerton?

A. I told Mr. Miller that Mr. Flynn and I had come to an agreement and told him that Mr. Flynn had told us that we could have the territory for a minimum of ten years or as long as we would like to have it. Mr. Miller said that was all right with him if it was all right with Flynn, because Flynn had charge, and he didn't have anything to worry about. I believe we had lunch together and I came home.

Q. Were there any details at all concerning this arrangement with Hunt mentioned by either you or Mr. Miller in that conversation?

A. I explained to Mr. Miller as I explained to Mr. Flynn generally—I might not have went into as much details—I don't believe I did, because Mr. Miller was very busy and I didn't take the time, because I understood——

Q. Just a minute. I just asked you whether any details [37] were mentioned, not any reasons for their being mentioned or not mentioned. Do you now

(Testimony of L. W. Phillips.)

recall any details concerning this arrangement that were discussed between you and Miller in that conversation?

A. We discussed the no-profit angle and why——

Q. What was said in that regard?

A. I told Miller that we had found out since the last time I saw him that there would be no profit in it for a while and the reasons why.

Q. I want you to tell us what was said. You didn't say, "The reasons why," did you?

A. Well, I told him the reasons why.

Q. What did you say?

A. I said to Mr. Miller, "We found out since the last time I saw you that the price list in the commissary stores was very low and we would have to sell at that list for a while and that we couldn't make any money for two or three years."

Mr. Miller said to me he understood that.

Q. Was the subject of the territory mentioned in that conversation with Miller? Let me withdraw that. Were any of the subjects of territory, length of time, whether or not it was to be exclusive, or any other details mentioned in this particular conversation between you and Miller? [38]

A. I told Mr. Miller we had an exclusive arrangement that we wouldn't feature any other line of canned goods in competition, we would handle Hunt's exclusively. I told Mr. Miller that Mr. Flynn had given us the Northern California territory which was directly under his jurisdiction.

Q. Did you ever talk to Mr. Church of the Hunt

(Testimony of L. W. Phillips.)

Foods Company? A. Yes.

Q. What was his position?

A. He was credit manager.

Q. When did you talk to him the first time other than maybe meeting him? I think you said you might have met him.

A. Yes. I believe that I talked to Mr. Church on this trip that I talked to Mr. Miller.

Q. Did you have any correspondence with Mr. Church?

A. Some time during the month of September I wrote Mr. Church a letter, I believe.

The Court: Do you want to offer that?

Mr. Rothert: I want to offer this.

The Court: You want to offer it in evidence? Any objection?

Mr. Cullinan: No objection.

Mr. Rothert: This is a letter from L. W. Phillips to Hunt Foods, Inc., attention Mr. John Church, dated September 17, 1951. [39]

(Whereupon the letter referred to was marked Plaintiff's Exhibit No. 1 in evidence.)

Q. (By Mr. Rothert): I show you Plaintiff's Exhibit 1, Mr. Phillips, and ask you is that a letter that you wrote on the date that it shows?

A. Yes, sir.

Q. Now, do you recall when you saw Mr. Church, talked to Mr. Church the first time before or after writing that letter?

A. If my memory serves me right, I talked to

(Testimony of L. W. Phillips.)

Mr. Church prior to this letter—met him and talked to him.

Q. Did you have more than one conversation with Mr. Church during the fall of 1951 or just one?

A. I believe just one—one conversation concerning our business connections. We, of course, met and passed the time of day but I think the business session was a result of this letter.

Q. I will ask you to read the last paragraph of Plaintiff's Exhibit 1, and ask you if that refreshes your recollection at all about the times when you may have talked to Mr. Church.

A. The last paragraph?

“I would like to call on you Friday, September 21, and answer any questions you may care to ask. We are anxious to get started with the new crop [40] coming up. Our chances are immediate for a considerable purchasing activity in the resale field. There are several outlets have been buying everything and naturally a line of foods, such as Hunt's, would appeal to them. Would you please advise if the Friday appointment mentioned is O.K.?”

Q. Now, did you see him after this letter of September 17th on or about Friday, the 21st of September?

A. Yes, sir. [41]

Q. Now, when you talked to Mr. Church, what was the subject of your discussions?

A. The subject of our discussion was the basis

(Testimony of L. W. Phillips.)

of this letter pertaining to credit and how much credit we would have to have, and how we were to pay it.

Q. Was anyone else present when you and Mr. Church talked?

A. I don't believe there were, no, just Mr. Church and I.

Q. Will you tell the Court what the conversation was that you had with Mr. Church at that time?

A. Mr. Church told me that he had decided to give us a line of credit of \$5,000, and that we were to pay it—and our discount period would be 2% ten days, and I said, "Mr. Church, our investigation has shown, which we had made previous, that \$5,000 would not be enough for one commissary. It is impossible to have it on \$5,000."

And he said, "Well, that is all right. Do the best you can do." And that was the end of our conversation.

Q. Did you have any further conversations with either Mr. Flynn, Miller or Church after those conversations you have already talked about and before you started actually selling the Hunt line to the commissary stores?

A. I believe in the interim between the starting—I mean in this time between September and December 1st—I wrote Mr. Ried a letter, because he had asked me——

Q. I asked you about conversations, not [42] letters.

(Testimony of L. W. Phillips.)

A. I wrote Mr. Ried a letter, that is all, no other conversation as I remember.

Q. Did you see Mr. Flynn again at any other time?

A. Yes, we saw Mr. Flynn probably three or four times about samples, labels, new prices, found out more about the buying he was doing, and so forth.

Q. Did you see Mr. Miller again after you talked to him the second time, which you said was about September 9th?

A. I don't remember. We might have seen Mr. Miller some time after that but I don't remember that. It seems like we were down there. I don't remember. Maybe I was.

Q. When did you start buying products from Hunt for use in this business of selling to the commissary stores?

A. We began to put a little stock in our warehouse to carry this on I believe October or November, some time in there, if I remember.

Mr. Cullinan: Counsel and I will stipulate that there were purchases made by Wellington Phillips Company from Hunt Foods on October 11th and 12th and 25th of 1951 for delivery to Wellington Phillips Company and marked "Promotional stacking and/or shipping allowance has been deducted."

Q. (By Mr. Rothert): These purchases that I have just described in October, 1951, Mr. Phillips, what were they for?

A. They were for an inventory to carry in our

(Testimony of L. W. Phillips.)

warehouse to supplement other items we might bring in later. [43]

Q. Did you have any sales of the Hunt line to the commissaries that these purchases would fill at that time?

A. Yes, in the month of December we could have. It is impossible for me to answer that question directly.

Mr. Rothert: Will you stipulate that a letter was addressed on November 26th, 1951 by Wellington Phillips Company to Hunt Foods, Attention Mr. Ed Steiger?

Mr. Cullinan: I will.

Mr. Rothert: I would like to offer this copy of that letter as plaintiffs' exhibit next in order.

Mr. Cullinan: I have the original of Mr. Phillips' letter, attached to which is the document referred to in the letter, and which Mr. Phillips suggested in the letter to be used. The document that Mr. Rothert just mentioned is the actual one that was used as modified a little bit. In other words, Mr. Phillips prepared this.

Mr. Rothert: The exhibit I introduced has that also.

Mr. Cullinan: Does it?

Mr. Rothert: Yes. In other words, Plaintiffs' No. 2 has attached to it a form letter like the one you have.

Mr. Cullinan: May I look at the form letter?

Mr. Rothert: That is Plaintiffs' Exhibit 2. I am now offering Plaintiffs' Exhibit next in order, this

(Testimony of L. W. Phillips.)

form letter signed Hunt Foods, Inc., by Howard Flynn, District Sales Manager. [44]

Mr. Cullinan: No objection.

(Form letter referred was thereupon received in evidence and marked Plaintiffs' Exhibit 3.)

Q. (By Mr. Rothert): I will show you Plaintiffs' Exhibit No. 3, Mr. Phillips, and ask you if you can identify that?

A. Yes, sir, I identify the first one. I meant we sent this copy out.

Q. The thing that you have in your hand, what is that? A. This on top?

Q. No, both pieces of paper.

A. A copy of a letter sent out by Mr. Flynn to the military bases.

Q. Did you get some at that time?

A. Yes.

Q. When was that issued?

A. Prior to September 1st and after November 26th or the date of that letter.

Q. Who furnished you with copies of that form letter which is Plaintiffs' Exhibit No. 3?

A. Mr. Flynn.

Q. What use did you make of those form letters after that?

Mr. Cullinan: I will object to that, if your Honor please, as to what use this man made of the bulletins—his part of the arrangement with Hunt is another question—but what use he made of them could not be relevant. [45]

(Testimony of L. W. Phillips.)

The Court: What was done with them?

Q. (By Mr. Rothert): What use did he make of the form letters which Mr. Flynn furnished to him, the copies that he got from Flynn?

The Court: Did you send them out?

A. No, sir.

Mr. Rothert: But Flynn sent him some or gave him some, and I asked him what use he made of the ones he got.

The Court: Do you mean what did he do with them?

Mr. Rothert: Yes.

The Court: Maybe he put them in his file.

Mr. Rothert: What I had in mind is when he called on these commissary stores, he had them in his possession.

The Court: Ask him that question.

Q. When you went calling did you carry some of those with you? A. Yes, sir.

Q. (By Mr. Rothert): When did you start selling Hunt's products to the commissary stores?

A. On or about the 1st of December, 1951.

Q. For how long a period of time did you sell Hunt's products to the commissary stores in that manner?

A. On or about the last week of April, 1953.

Q. From December 1 to late April, 1953?

A. Yes, sir.

Q. How many different military bases or commissary stores [46] did you do business with?

(Testimony of L. W. Phillips.)

A. Approximately 19.

Q. What was the price or price basis which you paid Hunt Foods for the canned foods that you bought from them and then resold to the commissary stores?

A. We bought Hunt foods on a jobber's basis.

Q. (By the Court): You mean the same price that other jobbers paid?

A. Yes, sir.

Q. (By Mr. Rothert): Was there just one jobber price for all jobbers or was there variation in jobbers' prices?

A. I was told there was just one jobbers' price and that was the price list that we got.

Q. In your sales of Hunt food products during this period from December, 1951, to April, 1953, did the volume of sales increase, decrease or remain constant? What was the experience that you had?

A. We had an increase in volume.

Q. What happened as to the number of items of the Hunt line that were sold to the commissary stores during the period of time you were selling?

A. We increased the items in the commissary stores.

Q. When you started out were there any commissary stores that did not have any Hunt's products in there at all?

A. Well, it would be impossible to say that, Mr. Rothert. [47] I would say there was a substantial amount.

(Testimony of L. W. Phillips.)

Mr. Cullinan: Just a minute. If it is impossible to say, I suggest that he not say it.

The Court: Yes. You can't ask it. Ask another question. I suggest that because he will make another talk if you do not. I am not saying this to be critical, but that is the experience with many witnesses. So if the lawyer keeps the thing in hand, we get the facts quicker that way.

Mr. Rothert: Does your Honor intend to continue beyond twelve?

The Court: We might recess until 1:30.

(Recess.) [48]

Afternoon Session—1:30 P.M.

Q. (By Mr. Rothert): Mr. Phillips, in these commissary stores what did you find was the situation as to the number of different brands of an item of canned goods as compared to super markets and big grocery stores?

A. We found a limited number of items in each store due to their restriction on the number of items that they could carry in any given item.

Q. In the ordinary super market, like a Safeway store, Purity, or something like that, how many different items do they carry or how many different brands of the same item do they carry?

Mr. Cullinan: If your Honor please, there is nothing in the record to show that this witness is familiar with what the super markets carry. His

(Testimony of L. W. Phillips.)

business apparently has been in dealing with government commissaries.

The Court: I do not see the materiality of this.

Mr. Rothert: I agree that it may not be material. The number that is carried in the grocery stores may not be as good as it would be if it were compared to, you might say, the civilian business.

The Court: Still I do not quite see the materiality as affecting either the contract or damages.

Mr. Rothert: I will withdraw that question.

Q. How many different brands of a single canned food item [49] were carried in the commissary stores in 1951 when you started this work?

Mr. Cullinan: Are you speaking of a particular commissary store? As I understand it, commissaries differ one from the other.

Mr. Rothert: I think the witness would have to explain that in his answer if there is a difference.

The Witness: No, sir, the regulations—

The Court: Just a minute. What are you trying to show, counsel?

Mr. Rothert: That in these commissary stores they carried only three or four brands of a particular item as distinguished from eight or ten or a large number of brands, so that if a brand was being handled by a commissary store that had fewer competitors in that particular line—for instance, string beans: If there were only three brands of string beans in a store, any one of the three had to compete only with the other two. If there were eight or ten brands of string beans in a store there

(Testimony of L. W. Phillips.)

would be a different competitive situation. As I understand it, the commissary stores were different from the ordinary super markets in that they only carried a limited number of brands of any one item, so that an item that is handled by a commissary store would have only two or three other brands to compete with for the commissary business.

The Court: What is the materiality of that? [50]

Mr. Rothert: I think it would be material to the question of damages. The prospects of obtaining a share of the commissary business——

The Court: You mean it would make it more certain of ascertainment of the damages?

Mr. Rothert: I think so, yes.

The Court: Easier of ascertainment.

Mr. Rothert: Yes.

The Court: You are now in a field in which you are establishing the manner in which alleged damages for the claimed breach of contract are——

Mr. Rothert: In my questioning, I had not gotten to the point of going into damages yet, but I wanted to bring out the various facts and details of his work in selling Hunt Foods and the factors that made the sales to commissary stores a little different from ordinary sales to super markets, for an understanding of the problems and the work that he did.

The Court: What is the materiality of that? Either there is a contract or there isn't one. Either it was broken or it was not. Whether the work was

(Testimony of L. W. Phillips.)

arduous, required a greater intelligence or a moderate amount of intelligence still would not be of any great importance, would it?

Mr. Rothert: We will eventually come to the question of damages, and since the work terminated at a point before he had been able to earn any profit, the damages claimed are [51] going to have to be based on a prospective profit that he could have made had he remained on the handling of the line for the contract period. In effect, it was terminated after he had been promoting the line for a while, and our claim for damages and the plaintiffs' estimate as to the prospects of profits will have to be based upon some of those factors. I think a complete understanding of the particular type of business involved would shed some light on the question.

The Court: That may be so, but I do not know just what you are getting at here. What is the relationship between any prospective loss of profits to whether or not there were fewer lines in the competition of the commissary stores than there were in the general field?

Mr. Rothert: Just for the purpose of argument or discussion of that point.

The Court: It is not worthwhile discussing it. If it is not material, the Court won't give it any weight. You want to establish the point that there were fewer lines——

Mr. Rothert: In the commissary stores they handled only three or four different brands.

The Court: Ask him the direct question.

(Testimony of L. W. Phillips.)

Mr. Cullinan: I would like to interpose the objection, if your Honor please, that I do not think this is relevant to the issues in this case or any issue in this case.

The Court: I am not certain that it is either, counsel. [52] You can either move to strike it or the Court will give it such weight as it is entitled to have. It takes too long to discuss these things just to get in a minor point of evidence. Ask him the direct question, counsel.

Q. (By Mr. Rothert): In the commissary stores, at the time you started in on the Hunt line, how many different items, different brands of the same item did you find were being sold in these commissary stores? A. An average of three.

Q. What was the largest number of brands of the same item that you found in any commissary store? A. Four.

Q. I think you testified during the time you worked on the Hunt line you were able to increase the profit margin on the resale to the commissary stores? A. Yes, sir.

Q. How were you able to increase the profit margin?

A. By selling the new items that had not been priced or sold before in the Hunt line in competition with other items, and by increasing the prices on the merchandise they had previously bought, due to a market condition going either up or down, which would force competition either up or down. I would not go down as far as competition went

(Testimony of L. W. Phillips.)

down and I would go up as far as competition went up. That was our method of increasing the profit. [53]

Q. You spoke about a market condition. Would that market condition affect the price of Hunt's selling price to you? A. Yes.

Q. How would it increase the profit margin if you just raised your prices to the commissary stores by the same amount as the increase of the Hunt's price to you?

A. When this market changed most of the competition would automatically go up as a rule. The market raises up. I would raise up more than the increase to me was. As an example, if the price went up a dollar, and I was under competition a dollar, they would raise a dollar, I would raise a dollar and a half, as an example.

Q. Would that be a case price?

A. That is a case price I am talking about.

Q. I will show you some various invoices from Hunt Foods to you, a memorandum of purchases from commissary stores in various military bases, and ask you if you could refer to any examples where you were able to increase the profit margin in sales to the same commissary stores?

A. We will take, for instance, Camp Cook, which is Lompoc in Southern California——

Mr. Cullinan: What was that again?

The Witness: Lompoc, one of our first sales at Lompoc was made, say, February of 1952, delivery in March of 1952. We grossed on that order one

(Testimony of L. W. Phillips.)

and three-quarters per cent. On [54] a \$581 we made \$10.83 gross. And the same base in April of 1953 we had increased our profit margin to 14½ per cent.

Mr. Cullinan: You mean on a sale made in April, 1953——

Mr. Rothert: May I see what the witness is refreshing his recollection by?

The Witness: November, 1952, this is.

Mr. Cullinan: I didn't understand the testimony. Was it that you grossed \$10 on the whole order that is dated March 20th, 1952?

The Witness: I will have to see it again to identify it, Mr. Cullinan. I have notes on the bottom of the order. This order is 1251, December, 1952, cost us \$403.45.

The Court: You are going over the same matter again. You have testified to that. Let us move along. If there is going to be any accounting in the matter I will refer it to a referee. I am not going to listen to an accounting in this case.

Mr. Rothert: I intended to ask him for some other examples of an increase in the profit margin. If your Honor thinks it would be unnecessary to take the time to do that——

The Court: The other side can cross-examine on it. You sold him some kind of a commodity later on and because there was a change in the market conditions you made more profit, is that right?

The Witness: Yes, sir. [55]

The Court: What is extraordinary about that?

(Testimony of L. W. Phillips.)

Mr. Rothert: I do not think there is anything extraordinary, your Honor.

The Court: What has that got to do with this case for breach of contract? Is it in connection with the claim for damages that he was arriving at a period when it was commencing to get profitable? Is that the point?

Mr. Rothert: Yes, detailed proof of his intention to have to sell the line without profit for a while before he could develop a profit margin for himself and start to make money.

The Court: He has covered that. I don't quite get the point of that though. I should not interrupt your examination, but it is not clear to me on that point. If the market conditions change, then that has nothing to do with—that is a normal thing. But what has that got to do with the idea that he had to sell it at no profit or at a loss for a long period of time?

Mr. Rothert: It was not that market conditions alone enabled him to make a profit, but when there was a market change, he was then able to decrease the spread between the Hunt prices and the competitors' prices and create a marginal profit for himself.

The Court: Why don't you bring that out? Ask him questions along that line. Otherwise it isn't clear to me. [56] Perhaps I should not have interrupted your examination. Maybe I am premature about it.

(Testimony of L. W. Phillips.)

Q. (By Mr. Rothert): Will you explain to the Court, Mr. Phillips, how you were able to get what you have said was a 14 per cent profit on the order in November, 1952, when you only got one and three-quarters per cent profit on the order early in 1952 to the same commissary store in Camp Cook?

A. At the first order in Camp Cook prices had been posted by Hunt Foods, by their sales force. As time progressed we added new items with a profit, a few, and then naturally the old prices were antique at that time and we automatically went up as far as we could toward competition on certain items, and that was our plan when we first started to do that, as we knew from a survey that it made competitive prices.

Q. How much of a spread, if any, was there between the Hunt prices when you started this work and the competitive prices?

A. About 25 per cent.

Q. You have given one example. What was your experience as to the profit margin on sales to other commissary stores other than to Camp Cook?

A. Approximately the same. Our first gross was one per cent and our last gross was nine at the end of 1952.

Q. What do you mean by the last gross? Do you mean an average?

A. Yes. [57]

Q. Was there any occasion when somebody from Hunt Foods went with you to visit the commissary stores?

A. Yes, sir.

Q. Who went with you?

A. Mr. Steiger.

(Testimony of L. W. Phillips.)

Q. When did he go with you?

A. The date I am not able to say. Some time during the month of April, I believe, 1953.

Q. I will show you a letter dated March 6, 1953, and ask you if that is the letter you received from Mr. Steiger of Hunt Foods?

A. Yes, sir, this is the letter and the date I referred to. I was mistaken by about a month.

Q. Does that refresh your recollection as to when Mr. Steiger went out with you?

A. That is right.

Q. When did he go with you?

A. The week previous to March 6.

Q. 1953? A. Yes, sir.

Mr. Rothert: May I offer this letter into evidence, your Honor?

(Letter referred to was thereupon received in evidence and marked Plaintiffs' Exhibit No. 4.)

Q. (By Mr. Rothert): Were there any bases, any commissary [58] stores where you had succeeded in getting a large number of Hunt's items accepted in a store?

A. Two particular bases at the close, at the time they asked us to stop, was Treasure Island and Alameda Naval Air Station, and on this trip with Mr. Steiger—

Q. I haven't asked you about that. Was Mr. Steiger with you at any time when a purchasing officer for commissary stores made statements concerning the handling of the Hunt line?

(Testimony of L. W. Phillips.)

A. Yes, sir, Mather Air Base, which was one of the largest. The purchasing officer told us that due to the service we had given them and being there on a certain date and helping with their price again, selection of items, he was now ready to put in Hunt's line 100 per cent.

Q. Mr. Steiger was present? A. Yes, sir.

Q. Did that occur on the trip that is referred to in Mr. Steiger's letter of March 6?

A. Yes, sir.

Q. Did that similar situation happen anywhere else?

A. A similar situation happened at Mare Island. At that time one of Mr. Steiger's salesmen was living in Vallejo, I believe, and he wanted to take the orders at Vallejo, Mare Island, which was all right with us because we were busy anyway, and when we went in we met a Commander Shea.

Q. When you say "we," who do you mean? [59]

A. Mr. Steiger and myself. Commander Shea and I went in the Navy together. Mr. Steiger found that out and he said, "Well, Phillips, you may as well take this base over, too, and handle it if you have the time."

I said, "We will find the time."

Q. Was anything said about the Hunt line?

A. He said he would put it back.

Q. He would what?

A. He said he would support the line, Commander Shea, and that he would prefer that we have it.

Q. Were there any commissary stores that you

(Testimony of L. W. Phillips.)

did not handle immediately when you started in December 1st, 1951? A. Yes, sir.

Q. Which ones?

A. Hamilton Air Force Base and later on, because they opened and we didn't know it, San Luis Obispo.

Q. Did you eventually handle Hamilton Air Force Base? A. Yes, sir.

Q. What was the occasion for it being taken over by you when you did not start out handling Hamilton Air Force Base?

A. Hamilton Air Force Base—one of the salesmen who lived over there hadn't had any trouble and his business was pretty good. They got ready to transfer. When they got ready to transfer, they asked us to take over the service at that base also, and I have forgotten the date—it is on our [60] invoices—San Luis Obispo opened up a commissary store and I didn't know anything about it. One of their salesmen went in and took the first order. They called us in getting that order to us and told us to service the account, which we did.

Q. In the handling of the Hunt line from December 1, 1951, to the end of April, 1953, do you know whether you made, lost money or broke even on it?

Mr. Cullinan: If your Honor please, I think the books and records of the man would be the best evidence of that, or his income tax returns.

The Court: Did you have any pretrial or preliminary discovery in this matter?

(Testimony of L. W. Phillips.)

Mr. Rothert: We had some depositions.

The Court: Haven't you covered the matter of records?

Mr. Rothert: Books were made available for inspection.

The Court: I am not going to take time to have the books produced and go over the books. That should have been done preliminarily. That is one of the reasons for our rules in the Federal Court. Frankly, gentlemen, in a case that comes here under the diversity jurisdiction, to take a lot of time going over somebody else's books—that is something you could have attended to by yourselves and not taken the time of the Court.

Mr. Rothert: They have been available. I think the witness is entitled to state the general situation, whether [61] or not he made or lost money. If they wish to cross-examine him on it or impeach him on his examination of the books, I think it is a privilege the other party has on cross-examination, or we can call his accountant in and let him give his conclusion of a study of the books if the Court does not want to be burdened with the books.

The Court: I am just saying that is something you could have accomplished in pretrial procedure. A statement of the business of the plaintiffs you could have covered by deposition, request for admissions, interrogatories, demands for production, and so forth, and have a statement made up as to the financial status of the account rather than here

(Testimony of L. W. Phillips.)

in the trial of this case. That does not make sense. [62]

Mr. Cullinan: I think the man's income tax returns would be the best evidence of his profits for the year 1952, or whatever year we are speaking of.

The Court: Not necessarily. The books would be just as good evidence if his testimony is that they are correct. On cross-examination you can go further into it. What I am saying now is why wasn't this done before, gentlemen? The trial is not the time for discovery of the evidence, I don't care how important this is, but technically I think counsel's objection is good; that whether or not there was a profit depends on what his records show if they kept records. He is entitled to object to it on the ground that it is not the best evidence.

Mr. Cullinan: I think that the income tax return would be a good summary of the income and expenses.

Mr. Rothert: That isn't the question I asked him.

The Court: That is not the question. The question was whether or not he made a profit or loss. I have no particular objection to his stating whether he made a profit or a loss, but if it is a question of amount, then the records would have to be produced.

Mr. Rothert: I have no question of amounts.

The Court: I beg your pardon?

Mr. Rothert: I don't intend to make any point of amounts. [63]

The Court: Oh.

(Testimony of L. W. Phillips.)

Mr. Rothert: Just a loss in an undetermined amount or a profit in an undetermined amount.

The Court: All right; let him answer that.

Q. (By Mr. Rothert): During the time you sold the Hunt line to the commissary stores, did you have a profit or a loss or break even on the Hunt business?

A. We lost on the Hunt business.

Q. What was your largest item of expense?

A. Traveling.

Q. Other than the cost of goods that you had to buy from Hunt's? A. Sir?

Q. Other than the cost of the merchandise that you paid to Hunt's, what was your largest item of cost of doing business in handling the Hunt's line?

A. Traveling and billing.

Q. During the time from December 1st, '51, to the end of April, '53, what generally was your status as to paying the Hunt invoices? Did you owe Hunt or did you always keep current or what?

A. We always owed Hunt money. As the business increased the amount we owed them increased, and it got up at one point to \$35,000 and dropped down to the time they closed, of 25. [64]

Q. What was the situation as to how rapidly the government paid you on the sales you made to the commissary stores?

A. The sales—the payments would average 30 days from our billing dates, and the billings dates would be a week ahead—ahead of Hunt's invoices, which would be five weeks, approximately.

(Testimony of L. W. Phillips.)

Q. Did you at one time assign an accounts receivable to Hunt's Food to cover some unpaid invoices of Hunt's Food to you? A. Yes.

Q. Did you sign some trade acceptances covering your obligations to Hunt's Foods on these invoices after the termination? A. Yes, sir.

Q. I show you what purports to be a letter dated April 16, 1953, and a statement of April 16, 1953, signed by Ed W. Steiger, and ask you if you identify that as a letter you received from Hunt's Foods on or about the date that it bears?

A. Yes, sir.

Mr. Cullinan: What was the date of that again, Mr. Rothert?

Mr. Rothert: April 16th.

May I read the letter for the Court's attention?

The Court: Certainly.

Mr. Rothert (reading): "Dear Mr. Phillips: [65]

"Your statement attached appears to be in much better shape than previous statements, in that only 1953 items are listed. We would, however, be much happier if you could clear up all January and February items which are a little beyond what our credit department expects in the way of progress.

"Thank you for your help in getting our statement adjusted to quite a reasonable standard.

"Very truly yours, Hunt Foods, Inc., by Ed W. Steiger, Assistant District Sales Manager."

The Court: Is that Exhibit 5?

The Clerk: It wasn't offered.

Mr. Rothert: I offer it at this time.

(Testimony of L. W. Phillips.)

(Whereupon letter referred to was marked Plaintiff's Exhibit No. 5 in evidence.)

Q. (By Mr. Rothert): At the time that you stopped selling Hunt Foods to the commissary stores, I think you have already testified that that resulted following a phone call from Mr. Steiger?

A. Yes, sir.

Q. When was that phone conversation?

A. I would say it was about the 26th of April, if that fell on a week day, a working day; about that time.

Q. And will you tell the Court what the conversation was you had with Mr. Steiger on that [66] occasion?

A. Mr. Steiger called me and said, "Phillips, we have been advised by Fullerton that Schwartz & Company will take over the selling of Hunt Foods on the first day of May. At that time you will stop."

And I said, "Ed, that is what we have been hearing," and I said, "You fellows know the agreement that you have with us." He said, "I know, but the whole thing is out of our hands and it is out of Miller's hands." That's all.

But that morning I had taken an order for——

Q. Just a minute. A. O.K.

Q. I just asked you about the conversation.

A. O.K.

Q. You said in that answer your statement was "That's what we've been hearing." What are you

(Testimony of L. W. Phillips.)

referring to when you say, "That's what we've been hearing"?

A. As early as the first of March, 1953, I had been told by two different purchasing people that they had been told that we were going to lose the Hunt account.

Q. All right. I will show you what appears to be a copy of a letter dated March 15, 1953, addressed to Lee Miller with the name "Phillips" typewritten on the bottom. What is that?

A. That is a letter I wrote Mr. Miller on the date shown here relative to my hearing again or hearing of the fact [67] that we were going to lose the account.

Mr. Rothert: May I offer this as Plaintiff's exhibit next in order, your Honor? Do you want me to lay the foundation?

Mr. Cullinan: Yes, because it will develop in our testimony that this letter was never received, so I think we ought to have a little more foundation for the introduction of this.

Mr. Rothert: I don't know if counsel is objecting or not, but this appears to be a copy of a letter of March 15, 1953. What did you have to do with any original of that letter? What did you do with it?

A. I came back from a sales trip.

Q. Just tell us, did you——

A. I mailed it.

The Court: Did you dictate this letter?

A. No, sir; I wrote it.

Q. What? A. I wrote it.

(Testimony of L. W. Phillips.)

Q. On a typewriter yourself?

A. Yes, as I did most——

Q. And after you wrote it, what did you do?

A. Mailed it.

Q. Yourself?

A. Yes, sir; at this post office. [68]

Q. (By Mr. Rothert): At about the date that appears on the letter? A. The same date.

Mr. Rothert: I would like to offer it at this time.

(Whereupon letter referred to was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Rothert): I will show you what appears to be a copy of a letter dated April 15, 1953, addressed to Hunt Foods, Inc., attention Mr. Lee Miller, with the typewritten name at the bottom, L. W. Phillips, and ask you to state what that is and what, if anything, you had to do with that paper?

A. I typed this letter also. That is a letter following my next trip 30 days later to these same places where I had heard the same story.

Q. Had you heard a rumor again that Phillips Company was going to be terminated from the Hunt line?

A. Yes, sir. At that time I had heard they were going on supply bulletin. This trip I hadn't heard the supply bulletin story; this one I had.

Q. And when you say "this trip," you had not heard of the supply bulletin?

A. The first one, the March trip, we had no sup-

(Testimony of L. W. Phillips.)

ply bulletin information. I didn't hear of it then. The next trip I heard of the supply bulletin information. That is why I asked to be put on supply bulletin in that letter. [69]

Q. Did you dictate or type this letter of April 15th? A. That's my typing again.

Q. And did you sign and mail it?

A. Yes, sir.

Mr. Rothert: I would like to offer this subsequent letter of April 15th as Plaintiff's next in order.

The Court: Very well.

(Whereupon letter of April 15th, 1953, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Rothert): What effect, if any, did these rumors that you have testified to that Hunt's line was going to be taken away from Phillips Company in March and April have on your business of selling to the commissary stores?

A. The bases that heard it, they had been told that they were going to buy it cheaper, and one particular base, Travis Air Force Base, made the statement after I had been working on it for a year, said that—a Major Bradley said, "Phillips, we hear very definitely that you are going to lose the account. Why worry about it? Why come over it every two or three weeks and try to sell us, because we think you are going to lose it. We hear

(Testimony of L. W. Phillips.)

it pretty definitely." And I got the same information from two or three other spots. [70]

Q. The question is what effect did that have on your sales to the commissary stores?

A. Cut them down.

Q. In this conversation you had with Mr. Steiger was there anything said about the money you owed to Hunt's Foods in connection with terminating your arrangement? A. No, sir.

Q. Did you talk to anybody else after you talked to Mr. Steiger on the telephone about your termination? A. After it was terminated?

Q. At any time after you talked with Mr. Steiger on the telephone on about April 26, 1953, did you talk to somebody else from Hunt's Food about the termination? A. Yes, sir.

Q. Who did you talk to?

A. I called Los Angeles, or Fuller, trying to get hold of Mr. Miller, and I couldn't reach him, and I believe I talked to Mr. Erlanger or Mr. Hooper; I am not sure which of those two men I talked to.

Q. How soon after the talk with Steiger was it that you talked to their Mr. Erlanger or Mr. Hooper?

A. The next few days, as soon as I could get hold of them. I tried to see Miller for a few days, but couldn't get him, so I talked to somebody else; I don't know who it was. I mean I don't remember who it was; I didn't know them personally, so [71] I didn't remember who they were.

(Testimony of L. W. Phillips.)

Q. Is it your testimony you don't know the identity of the person you talked to then?

A. Yes, sir, because I don't know them personally. I was told by Mr. Steiger to call, I believe Mr. Erlanger or Mr. Hooper, who were vice presidents I believe at that time.

Q. What was the telephone conversation you had with either Mr. Erlanger or Mr. Hooper when you called them?

Mr. Cullinan: If your Honor please, I will object to this unless he can identify with whom he talked. He doesn't know either of these gentlemen. He doesn't know which one, if either, he talked to.

The Witness: I talked to one of the two, but I know what I said.

The Court: Well, if you don't know which one you talked to, the proper foundation has not been laid; there is no way of meeting it. That will go out unless the witness can say who he talked to.

Mr. Rothert: Well, I suppose that may be correct. It seems unfortunate that the witness can't remember for sure which one he talked to, that the conversation is excluded.

The Court: It may not be excluded; there may be other ways to get it in.

Mr. Rothert: Yes, I appreciate that.

The Witness: May I ask who the general sales manager was [72] at that time? Was it Mr. Erlanger?

Mr. Rothert: No, but if you talked to somebody who admitted he was the general sales manager or

(Testimony of L. W. Phillips.)

said that he was somebody's superior or said he was in the same office with somebody or something like that, you may have a basis for identification. You called Mr. Miller and you didn't get Mr. Miller?

A. That's right; I couldn't get hold of him.

Q. What happened then?

A. I called Mr. Steiger and he said, "Well, get a hold of Mr. Erlanger or Mr. Hooper." Mr. Erlanger——

Q. Who did you ask for then when you called next?

A. I believe I asked for Mr. Hans Erlanger.

Q. What happened when you asked for Mr. Hans Erlanger?

A. I would say he is the man I talked to.

Mr. Cullinan: I ask that that answer be stricken as not responsive to the question.

The Witness: I definitely say I talked to Mr. Erlanger.

Q. (By Mr. Rothert): Well, you asked for Mr. Hans Erlanger. Then what happened after you asked for Mr. Hans Erlanger?

A. I talked to him on the telephone.

Q. A little while ago you said you weren't sure whether you talked to Erlanger or Hooper. Did somebody come on the phone?

A. Somebody came on the phone.

Q. And what was said when somebody came on the phone? [73]

A. I said to them that they had cut us off awful quick up here.

(Testimony of L. W. Phillips.)

Q. Did you ask anything about who you were talking to or did you just talk to an unidentified voice? A. I asked who I was talking to.

Q. Well, what was said? What did the other voice say?

A. This person said, "Mr. Erlanger." That is the person; I remember now I talked to Erlanger. It may not have been this particular time immediately after they quit, but I talked to Erlanger within a few days after we quit—after they quit us, rather. I was rather upset at that time and I was getting a hold of anybody I could, but I talked to Mr. Hans Erlanger within the week after this termination, and I told him we had been cut off rather suddenly; that we had had an agreement up here——

Mr. Cullinan: Just a minute; I object to the answer as not responsive to the question. I don't know whether we are talking about one conversation or a subsequent one. The one that you are asking about, I don't know whether we are talking about that or one subsequent.

The Court: What conversation did you want to bring out? What conversation did you wish to ask the witness about?

Mr. Rothert: The next conversation with any representative of Hunt's Foods after the phone call from Mr. Steiger telling him that they were not to sell starting May 1st. I [74] asked the witness to explain whether he knows to whom he talked on the very next conversation after Steiger's conversation.

(Testimony of L. W. Phillips.)

The Court: Yes. Can he answer that?

Q. (By Mr. Rothert): Do you know what representative of Hunt's Foods you talked to next after talking to Mr. Steiger on about April 26 on the telephone?

A. The next person I talked to after Mr. Steiger was Mr. Erlanger; I am sure of that now.

Q. And how much after the phone conversation with Mr. Steiger was it that you talked to Mr. Erlanger?

A. Within a period of seven to eight days; I would say ten days.

Q. All right. Will you state what conversation you had with Mr. Erlanger on the telephone on that occasion?

A. I told him that we had been trying to get hold of Mr. Miller for several days and couldn't, and I was advised to call him; and that we had been cut off up here and that we had an agreement with Hunt's to sell their line in Northern California. And he said, well, they didn't have any record of that agreement down there.

I said, "Well, I don't know anything about that; we have it up here. Mr. Flynn made it. And that we have been selling it and we have reduced our bidding business and we want to know if we can't have and maintain Northern California." [75]

He said, "The contracts have already been written with the New York concern and we can't do anything about it."

Q. Is that all the conversation on that occasion,

(Testimony of L. W. Phillips.)

then? A. As far as I can remember.

Q. Did you ever talk to Mr. Miller about the termination? A. Yes.

Q. When, and was it a personal talk or a phone conversation?

A. I don't remember a phone conversation with Mr. Miller after the termination, right immediately after. I went down to see Mr. Miller.

Q. When did you go down?

A. I would say the middle of May.

Q. Did you talk to him? A. Yes, sir.

Q. Was anyone else present? A. No.

Q. What was the conversation you had with Mr. Miller when you saw him down at Fullerton?

A. I asked Mr. Miller what they were going to do about our agreement up here and he said, well, it was out of his hands but that he would try to get the line back for me in July, let them go 90 days—or August. July, I believe he said, the last of July, which would have been May, June, and July—and he would try to get the line back to me at that time.

Q. Did you have a lot of correspondence with Hunt Foods after [76] the termination about the status of your account and the invoices that had not been paid? A. Yes, sir, quite a bit.

Q. That correspondence was mainly with Mr. Church, their credit manager?

A. Yes, sir, that's right.

Q. I show you a copy of a letter from Hunt Foods. Inc., John L. Church, head of credit and collections department, addressed to Wendell Phil-

(Testimony of L. W. Phillips.)

lips Company, dated October 8, 1953, and ask you if that is a copy of a letter you received except for the notation written in pen and ink on the face of it?

A. Yes, sir, this is a letter we received.

Q. That pen and ink notation, was that a notation you made on it?

A. I made it when I got the letter. I made it.

Q. You made it when you got this particular piece of paper? A. That's right.

Mr. Rothert: Shall we stipulate that this notation be disregarded?

Mr. Cullinan: Yes, so stipulated.

Mr. Rothert: I would like to offer this letter of October 8, 1953, as plaintiff's next exhibit in order.

(Whereupon letter of October 8, 1953, referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.) [77]

Mr. Rothert: The only purpose of that, Your Honor, there is a statement in the letter that says:

"In fact I have talked to Mr. Erlanger about the resumption of commissary business and allowing you to handle it on a commission basis. He tells me to ask you to hang on a little longer as the Francois Schwarz matter is being reviewed and I hope one of these days to get this business back for you."

Q. You have testified that you signed some trade acceptances after the termination and that they

(Testimony of L. W. Phillips.)

covered the amount owing on the invoices from Hunt Foods.

A. Yes, sir, I was asked to do that by Mr. Church so that on his books the account——

Mr. Cullinan: Just a minute, if Your Honor please.

Mr. Rothert: All right.

Mr. Cullinan: The question has been answered.

Mr. Rothert: Yes, I will agree to that.

Q. After the termination as of the first of May, 1953, what business activities did you engage in after that?

A. We started to resume our bidding business and we also went into the brokerage business to the domestic trade.

Q. What was the financial condition of your company after the termination as of May 1st, 1953?

A. It was lower than when we started, but our statement of [78] fifty——

Q. Don't tell us what some statement contains. We can produce the statement if we wish to use it —if anyone wishes to use it.

Q. Did you have any capital after you were terminated on the Hunt Food line with which to operate your bidding business?

A. Only accounts receivable.

Q. To what extent were you able to resume the bidding business after that termination?

A. Percentage-wise?

Q. Well, make a comparison of the amount of

(Testimony of L. W. Phillips.)

business you had before you started handling the Hunt line.

A. We were able to bid on probably 25 per cent of our previous bidding.

Q. Was there any——

Mr. Cullinan: If Your Honor please, I move to strike that answer as obviously a guess or a supposition and not based on any factual knowledge that is before the court—it was probably some percentage.

The Court: It is a conjecture only.

Mr. Rothert: I think it is an estimate or an opinion of the witness as to his own business.

The Court: Unless he is using the word “probably” as synonymous with “about.”

Mr. Rothert: If he is using it as synonymous with [79] “about” it would be an estimate.

The Court: Well, ask him the question again.

Mr. Rothert: I think maybe I can get at it——

The Court: He wants to know if you can say now with any degree of certainty the approximate percentage of business you did after the cutting off of this Hunt business with relation to the business you had at the time you took over the business.

A. 25 per cent.

Q. (By Mr. Rothert): Were there any factors that existed in the summer of 1953, affecting the bidding business that were not factors in 1951, before you started the Hunt line?

A. Yes, sir.

Q. What were they?

(Testimony of L. W. Phillips.)

A. Credit and capital.

Q. In what respect was there any difference with your credit and capital in '53, as compared with '51?

A. In '51, we had a line of credit with Overseas Finance and Trading, who was our limited partner; also a line of credit built up on a known profit structure that we had told people about. In '51—or in '53 the profit structure had been eliminated and the line of credit had been disbanded.

Q. You are speaking about the Overseas Finance and Trading Company line of credit?

A. That's right. [80]

The Court: You did no other business except the Hunt business after you took over the Hunt line? A. Did we do any other business?

Q. Yes.

A. We did some. We reduced our bidding business, though.

Mr. Rothert: I think he has previously testified, Your Honor, that prior to the time of the termination the bidding business had been reduced to 20 per cent of what it had been before.

The Court: All right.

Q. (By Mr. Rothert): Had the partnership made money or lost money in 1952, if you know or remember?

Mr. Cullinan: If Your Honor please, I submit the income tax returns are the best evidence whether they made or lost money in the year 1952, otherwise it is a guess or supposition.

(Testimony of L. W. Phillips.)

The Court: Well, he is not asking for any figures. The owner of a business ought to know that much about it.

A. We lost money in '52.

Q. (By Mr. Rothert): At the time of termination can you state about how many different items in the Hunt line you were then selling to the commissary stores?

A. Yes, we know.

Q. How many? A. Average?

Q. No, I didn't ask about average. [81]

A. You mean the highest number in any place?

Q. Yes.

A. 35. The lowest number would be one.

Q. I think you said it was the Treasure Island Purchasing Officer who had stated he would take your entire line. How many items had you sold at Treasure Island?

A. Probably 35. But you must understand when they say entire line they, "We will put it in," they had to eliminate certain other lines to put it in.

Q. Did you have any sales to Treasure Island after that statement by its purchasing officer before you were terminated, do you remember?

A. Yes, as items were eliminated, he would buy that item of Hunt's, replace it with Hunt's instead of some other brand.

Mr. Cullinan: I didn't get that answer.

The Court: Read it.

(Answer read.)

Q. (By Mr. Rothert): Do you know what

(Testimony of L. W. Phillips.)

quantities of Hunt's canned foods you sold to the commissary stores during the period you had the line? A. In 1952 we sold \$94,000 plus.

Q. Did anyone from Hunt's Food ever make any statements to you as to how the business you were doing compared to what they had been doing before you took over?

A. They told us we had doubled it. [82]

Q. Who told you? A. Mr. Steiger.

Q. When?

A. On this trip with us—the March 6th trip with me.

The Court: What was that answer?

Mr. Rothert: "They told us we had doubled it."

The Court: That was the word.

The Witness: Doubled it.

Q. (By Mr. Rothert): Now, in handling the Hunt's line did you have any system or frequency in which you made calls to these commissary stores?

A. Yes, sir.

Mr. Rothert: I might explain, Your Honor. You may be wondering what this line of questioning is for. I want to go into some matters that would be material to the issue of damages and to develop that as the business increased the cost of handling would not, at least in nearly the same proportion, as matters bearing upon the issue of damages.

The Court: You mean the expenses were fixed?

Mr. Rothert: Certain expenses, like making a call on a commissary store with a certain frequency,

(Testimony of L. W. Phillips.)

it wouldn't cost any more for traveling expenses to line up a bigger order than it would a smaller order, and factors of that kind.

The Court: Well, what was the question?

Mr. Rothert: I will repeat it, Your Honor. [83]

Q. (By Mr. Rothert): While you were handling the Hunt's line, what was the frequency with which you called on these various commissary stores?

A. The frequency with each store was the same. The frequency with different stores was different, of course, because they had different inventory periods and different buying day periods and different times of the day when I would see them, but they would remain static all the time.

Q. How often would you go to the commissary stores? Every week, month or quarter?

A. We called on every commissary store at least once a month. At some commissary stores we called twice a month, some commissary stores we called every week, and then at intervals we would go back and leave samples and things of that nature.

Q. I will ask you to assume that the business, the sale of Hunt's products to these commissary stores would have increased if the arrangement had not been terminated. With an increase would there be an increase in the traveling expense of calling on these commissary stores? A. No, sir.

Mr. Cullinan: If Your Honor please, I think first that assumes something not in evidence; secondly, I do not think it is competent, relevant or

(Testimony of L. W. Phillips.)

material in this action as to what might have happened if something else in the future had [84] happened.

The Court: What he is trying to develop is that more business could be done on the same trips, I suppose.

Mr. Rothert: Yes.

The Court: Counsel's objection goes to the fact that it is speculative in the form in which you put it, which may be correct. Ask him what the relationship was.

Q. (By Mr. Rothert): Was there any relationship between the size of the orders you got from the commissary stores and the cost of traveling expense to call on the commissary stores?

A. No, sir.

Q. (By The Court): You mean that the more business you could get from the commissary stores on the set-up you had the more money you could make if it was a profitable business?

A. Yes, sir.

Q. Because of the fact that the expenses were more or less static?

A. That is right.

Q. In a general sense?

A. Yes, sir.

Q. (By Mr. Rothert): Do you have any opinion concerning the quantity of canned foods that were sold by any of these commissary bases during the time you were handling the Hunt's line based on the survey and investigation and observation that you made during that period?

(Testimony of L. W. Phillips.)

Mr. Cullinan: I will object to that as calling for the [85] opinion and conclusion of the witness.

The Court: I am inclined to think that that is an objectionable question.

Mr. Rothert: It calls for an opinion obviously from the very wording of the question.

The Court: How can he tell what business they did in Hunt's foods?

Mr. Rothert: From what information he receives from the purchasing officers.

The Court: That would be hearsay. I wouldn't pay much attention to what John Smith tells me what business the Emporium does. Those things are carried through the channels of hearsay and may become very unreliable.

Mr. Rothert: I appreciate that. We have a problem in this case. The military considers the dollar volume of sales at commissary stores as classified information for security purposes. I have subpoenaed a Colonel of the Sixth Army to be here. I think he will probably be here tomorrow. I am sure he won't give any information.

The Court: What is the purpose?

Mr. Rothert: The purpose of it is merely to show that the amount of canned goods sold in the commissary stores in this area is very large and would not have been a particular limitation on the opportunities of selling Hunt foods just from the volume of business. In other words, if all the [86] commissary stores together only bought, say, \$100,000 of canned goods a month, that would be a definite

(Testimony of L. W. Phillips.)

limitation, but if they bought two or three million dollars a month, then it wouldn't make any difference.

The Court: I think you can safely assume that these commissary stores would buy a larger amount of goods. I do not see that that is any problem. Your problem is whether or not your client was going to get more of that as the years went by.

Mr. Rothert: That is true.

The Court: I think it is not an unreasonable assumption that there is a lot of that merchandise purchased by the commissaries. You could probably get enough information from this Colonel you spoke about at least to develop that without going into the exact figures. Your problem is that out of the California law, as I recall it, you can recover for prospective profits on a breach, but there must be some basis for the testimony. Even the greatest difficulty of proof does not eliminate the right of damages, but you still have to have some basis for an estimate, and to a certain extent I suppose such damages are speculative, because if you start estimating your future profits, you are engaging to a certain degree in speculation.

Mr. Rothert: That is right. I think that in any business—— [87]

The Court: I did not mean——

Mr. Rothert: Is this a convenient time to take the afternoon recess?

The Court: All right, we will take the recess.

(Recess.)

(Testimony of L. W. Phillips.)

Mr. Rothert: Your Honor, I have suggested to Counsel, subject to the Court's approval, that it might be more orderly and save time in the long run if I reserve further questioning of the witness on the issue of damages to permit a sort of marshalling of the facts and his getting together with the records that he would want to refer to this evening and let Counsel start his cross-examination on what has been covered so far.

The Court: Reserving only the matter of damages?

Mr. Rothert: Yes, your Honor, and go into that tomorrow. It might save time of the Court and be more orderly to grope around about it, because these invoices have been scattered and disarranged.

The Court: As long as what is reserved is on a particular subject of damages so we won't get confused about it either, that is agreeable.

Is that agreeable to you, Counsel?

Mr. Cullinan: Yes.

The Court: Have you completed the examination of this witness that you want to make?

Mr. Rothert: Of this witness except on the issue of [88] damages.

The Court: Then you wish to afford Counsel the opportunity to cross-examine at this time?

Mr. Rothert: Yes, your Honor.

Mr. Cullinan: I would like to cross-examine on damages after Mr. Rothert has completed.

The Court: Of course.

(Testimony of L. W. Phillips.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Phillips, was there any written agreement between you and Mr. Holm and the Overseas Finance Company as to your partnership?

A. No.

Q. No? A. No.

Q. And you have been doing business as a partnership ever since 1951 when it was formed, haven't you? A. Yes, sir—1950.

Q. 1950. Excuse me. And since that time and now you have been working exclusively for the partnership? A. That is right.

Q. Overseas, you say, is a limited partner?

A. Yes, sir.

Q. But it is true, is it not, that in many letters to Hunt Foods you claim that they were a general partner rather than a limited partner? [89]

Mr. Rothert: I am going to object on the ground that it calls for the witness' conclusion and not the best evidence of any letters that he wrote.

The Court: I think that is true, Counsel. It calls for the contents of a written document.

Mr. Cullinan: Yes, your Honor. I will come back to that.

Q. Is there a Wellington Phillips Corporation?

A. Yes, sir.

Q. When was that corporation formed?

A. I don't remember.

(Testimony of L. W. Phillips.)

Q. To refresh your recollection, wasn't it some time in early 1952 that you formed a Wellington Phillips Corporation?

A. Well, if that is what the record shows, it could have been there, as far as I know. You have the information.

Q. Do you remember the occasion of the taking of your deposition, the photostat of an agreement dated May the 26th, 1952, between Linholm of Sweden and yourself was introduced?

A. That is right.

Q. Mr. Linholm was the head of the Overseas Finance and Trading Company, wasn't he?

A. Yes, he is president.

Q. And that agreement, without introducing it at this time, which was dated May 26, 1952, described the formation of this corporation, did it not?

A. That is right. [90]

Q. And the articles had been signed as of the time or before the time that this agreement was Linholm was drawn up?

A. Did you say signed before?

Q. Yes, this refers to a corporation as being in existence, and I think maybe we can just stipulate that it was some time in the early part of 1952 that the corporation was formed.

A. That is about right.

Q. Who suggested the formation of the corporation?

A. Mr. Linholm.

Q. Mr. Linholm?

A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. Did you discuss the formation of this corporation with anyone else?

A. His secretary and treasurer, I believe, Mr. Willy, Norman Willy.

Q. Are those the only ones you discussed the formation of this corporation with?

A. As far as I remember.

Q. Did you discuss it with Mr. Liholm, the plaintiff in this action?

A. I advised Mr. Liholm—he was out of the country at the time—by letter.

Q. And you had planned to dissolve the partnership, to transfer the assets to the corporation, and thereafter do business in a corporate form? [91]

A. At some later date. That was Mr. Linholm's plan.

Q. Was the corporation ever active?

A. No, sir.

Q. Did the corporation ever have any assets?

A. Yes.

Q. When did it first get assets?

A. I don't know that.

Q. What kind of assets did it have?

A. Cash.

Q. Where did it get the cash?

A. From Mr. Linholm.

Q. You mean from Overseas?

A. No, from Mr. Linholm.

Q. Personally?

A. Yes, sir, I believe that is right.

Q. You do not know?

A. I was told.

(Testimony of L. W. Phillips.)

Q. You were president of that corporation, were you not? A. That is right.

Q. Is that corporation still in existence?

A. It has had its name changed but it is still in existence.

Q. It had its name changed just a few months ago, did it not? A. That is right.

Q. But no business was ever done by the corporation? A. No, sir. [92]

Q. At all times since 1951 the partnership has consisted of yourself, Liholm and Overseas Trading and Finance Company, a limited partner?

A. That is right.

Mr. Rothert: Did you use the name Linholm or Liholm?

Mr. Cullinan: Liholm. Just as an aside, there is a Linholm and Liholm. [93]

Q. When did you last see Mr. Liholm?

A. I wouldn't remember.

Q. Well, you haven't seen him since 1951; isn't that a fact? A. I believe that's right.

Q. In fact, you didn't see him in 1951; isn't that a fact? A. Oh, I saw him in '51.

Q. Didn't he go to Sweden in 1950?

A. Oh, I don't remember; I wouldn't want to be explicit about it. It seems as though he was here in '51. You mean during the year that we operated, '51? Well, sure, he was here in '51.

Q. The whole year of '51?

A. I don't know what part of it. He was here some part of the year '51, I am sure of that.

(Testimony of L. W. Phillips.)

Q. He was not around here when you had any dealings with Hunt's? A. No.

Q. Now, Mr. Phillips, you have filed an action in the federal court, No. 34,801, on July 29, 1955, against the Blue Star Company, and that action was filed by you alone, was it not?

A. I don't know that.

Q. The plaintiff in that action is only you, isn't it?

A. I don't know that. Fedder and Ferguson filed the action. [94] I don't know how it was filed; you will have to question them.

Q. And that action is for services rendered by you to Blue Star in the year 1952, is it not?

Mr. Rothert: Your Honor, I am going to object on the ground that this subject of interrogation is incompetent, irrelevant and immaterial and beyond the scope of the direct. I don't know of any connection between that action and the issues in this case.

The Court: Well, I don't know either, counsel.

Mr. Cullinan: It is pertinent in two respects, if your Honor please. The man has testified that he and Liholm were partners and they had always done business as a partnership; he has only been working for the partnership since 1951. Now he comes along and files an action by himself as an individual against a company for services similar to those claimed to be involved in this action for the year 1952, the time he started to work for Hunt's. I think it is material here; that the man is

(Testimony of L. W. Phillips.)

—he is either a partnership or not a partnership. There may be a failure of proof in that regard, if Liholm isn't a partner. If he were a partner he would be in this action.

The Court: Maybe he claims these were separate services that this witness performed or maybe there was an assignment. Anyhow, what difference does it make? He has already testified that he had about 25 per cent of the old business left in [95] '52 when he was working for Hunt. What is the materiality of that?

Mr. Cullinan: To show that the type of services rendered Blue Star is the same type that he is claiming he was going to render to Hunt's Foods.

The Witness: No, sir, it is not.

Mr. Rothert: Oh, you mean to say that he wasn't performing his agreement?

The Court: Is it to controvert the claim that this was an exclusive arrangement with Hunt to sell to the commissaries?

Mr. Cullinan: That he was working for other companies in a similar way that he purports to have been working here.

The Court: You mean selling their products to the commissaries?

Mr. Cullinan: I wanted to find out whether he was selling to the commissaries or not, or where he was selling.

The Court: Oh.

Mr. Cullinan: Also the fact that he testified that he worked exclusively for the partnership during

(Testimony of L. W. Phillips.)

the period. Then how can he file a suit as an individual for services rendered to another company?

The Court: That would be another lawsuit.

Mr. Rothert: That is the problem in that case.

The Court: I think we have got enough to determine in this lawsuit. [96]

Mr. Rothert: Whether or not he has a disagreement or conflict with his partner is not important here.

The Court: It might be admissible to controvert the statement that he acted exclusively with the commissaries for Hunt during this period. To that extent it might be. Otherwise, I don't see the materiality of it, counsel. If there were any question of the equivalent of double jeopardy in a criminal case, if you could be sued again on the same claim, but you have no concern in that regard, because both of these parties are plaintiffs in this action. However, the inquiry would be pertinent to the extent of establishing any rebuttal of the statement that he was engaged exclusively in the commissary business for Hunt. You may pursue it to that extent.

Q. (By Mr. Cullinan): You were not engaged exclusively in the sale of Hunt Foods to the commissaries during the period from December, '51, to April, '53?

Mr. Rothert: Your Honor, I think that is ambiguous. He has already testified that his bidding business was still about 20 per cent of what it had been before. It isn't clear from the question whether

(Testimony of L. W. Phillips.)

he means his business with the commissary stores with exclusively selling Hunt items or whether his business was exclusively the selling of Hunt items in commissary stores and nothing else.

The Witness: In competition. [97]

The Court: No, no, that isn't what I meant by my question.

Mr. Rothert: I didn't think it was what you meant.

The Court: No; I said it would be proper to go into it to the extent of showing that he was not handling Hunt's business exclusively with the commissaries. He has already testified that he had other business—other government business, and he distinguished the commissary business from the general sustenance business, I believe you said.

A. That's right, sir.

The Court: But you have a right to inquire into that. I am not foreclosing counsel from going into that.

Mr. Cullinan: I will come to that.

Q. I will ask you, now, Mr. Phillips, about your first meeting with Mr. Flynn, which was in August of 1951. You had sought a brokerage arrangement as from that time, had you not?

A. As of that time?

Q. Yes.

A. We sought it prior to that time, to the—for the bidding business. We would not go to Mr. Flynn for a brokerage business; we would go to Mr. Ried for that. He had charge of the brokers in the mili-

(Testimony of L. W. Phillips.)

tary setup; he had charge of all the military business that Hunt did. Mr. Flynn or Mr. Miller had nothing to do with it. [98]

Q. You get commissions on brokerage, do you not? A. That's right, sir.

Q. Do you get commissions on bidding business?

A. No. It depends on how it is handled. There are two types of bidding jobbers. There is one type of bidding jobber that bids in the name of the packer; he gets a brokerage. There is another type of bidding jobber that bids in his own name and he doesn't get the brokerage.

Q. Which type of bidding business were you in?

A. We were in some of both. Where we could get bidding and the brokerage, we, of course, got it. That is an added income. That was what I was after Hunt for with Mr. Ried.

Q. When you met with Mr. Flynn in August of '51 you suggested, did you not, a brokerage arrangement on overseas sales?

A. I couldn't; he wouldn't have anything to do with it. That is Mr. Ried's department. I might have said something to him about it, but he would have no authority to handle it; I would have to go to Mr. Ried.

Q. Now, that first meeting with Mr. Flynn in August of '51 lasted just a few minutes, didn't it?

A. Well, I wouldn't say how long. What did you say, a few minutes? I was probably there a half an hour or more.

Q. I call your attention to the question and an-

(Testimony of L. W. Phillips.)

swer in your deposition appearing on page 7, line 10, referring to this meeting: [99]

“Q. How long did that meeting last?

“A. Oh, just a very few minutes.

“Q. Just a few minutes?

“A. Yes, just conversation, you know. I asked them what they wanted to do, what their plans were, how they wanted to handle it, where they wanted me to go, and how much of a territory they wanted me to call on.”

The Witness: That would take about a half an hour.

Q. Now, as of that time, you knew Mr. Flynn casually, didn't you? A. Howard Flynn?

Q. Yes.

A. Well, I had known him for years as being an exsalesman or district manager of CHB Pickle Company, which Hunt's bought out.

Q. I am not asking whether you knew of him.

A. I knew him.

Q. You knew him just casually?

A. I had met Howard several times before.

Q. Well, I call your attention to a question and answer appearing on page 75 of your deposition:

“Q. Now, with respect to Mr. Flynn, you earlier testified about that meeting in September with him. As I understand it, you knew him before that [100] meeting with him?

“A. Yes, I did, casually.”

(Testimony of L. W. Phillips.)

The Witness: That's right. Well, casually, we had had not too many business dealings, but I had known Howard for probably 10 or 15 years.

Q. Then your next meeting with a representative of Hunt's you testified was with Mr. Ried and Mr. Miller, I think you said, in the latter part of August of '51. That was a meeting after this first meeting with Flynn? A. That's right.

Q. And you had gone down there to call on Mr. Ried, had you not?

A. Mr. Miller—Mr. Flynn asked me to go down and see—meet Mr. Miller.

Q. When you went down there you first met with Mr. Ried because he was the one you knew?

A. I called on Mr. Ried and he took me— [101] and he took me and introduced me to Mr. Miller.

Q. In fact, you met in a coffee shop down there at Fullerton; isn't that where you met?

A. No; we ended up in a coffee shop; I met him in his office. I went in to see Mr. Ried and Mr. Ried took me in to see Mr. Miller and Mr. Miller called—he might have called Mr. Church and we all went out and had coffee across the street. Mr. Church's office was four or five hundred yards away from the other office and we met out in the coffee shop after we had discussed what little business we had to discuss.

Q. You don't remember now whether Mr. Church was or was not present?

A. I am not so sure, no.

(Testimony of L. W. Phillips.)

Q. Now, you left that meeting saying that you were going to look over the commissary sales area?

A. That's right; see what the possibilities were.

Q. And then your next meeting after that was with Mr. Flynn in September of 1951; is that right?

A. That's about right.

Q. Will you tell us as near as you can remember what was said and in the order it was said at that meeting? That is the September 6th—roughly September 6th, early September meeting with Mr. Flynn.

A. I said, "Mr. Flynn, I have spent the last few days surveying the commissary stores, ascertaining their volume, [102] possibilities of the business, and it runs into thousands and thousands of dollars. We'll be interested in handling Hunt's line exclusively and sell no other canned goods in competition with you under these conditions"—and I told him that I had found in the commissary stores and from the commissary officers a list of their merchandise that had been left by his sales force and I had been given—I told Howard that I had his jobbing list and my cost on Hunt foods was practically their cost, the only difference being five or ten cents a case.

Q. Now, what—go ahead.

A. And I said, "It will be impossible for us to make any money on Hunt's Foods until the canning season rolls around again or markets go up or down or we get a new item in, because we can't get more for it than you have been quoting."

(Testimony of L. W. Phillips.)

He said, "I understand that, Phillips. We know our people have been selling them and we know that you can't make any money for a while."

I said, "Well, Howard, the canning season comes up next year, so we know that for two years, at least, we won't make a dime due to that condition, over our costs. Then it will take another two or three years to get that profit back that we would have made. And then if we can't have it for another five, which would be a total of ten, we are not interested, because we have now a very successful bidding business and our [103] business is good, our profit is good, and this year we will make around fifteen or \$20,000, because we keep"—the reason I said that to him, we were keeping a running record of our profit as we went along the first year in our business so we knew what we were doing.

But I said, "There is a tremendous business, a million-dollar business, and we would be very glad to take it under those conditions."

And I said, "We are also—have also been talking to Libby, McNeill, and they have said that they would let us handle their line exclusively, but nothing was ever done." And I said, "If Hunt's are ready to go under those conditions, we are ready to go, but we will have to discontinue a great percentage of our bidding business because the sale of canned goods to the commissary stores will require all of my time. I don't have any other personnel, as we just started a year ago to do this bidding

(Testimony of L. W. Phillips.)

work. I don't have a salesman capable of selling the commissary stores."

He said, "Well, Phillips, we want you to take it because that will eliminate our salesmen being held up in commissary stores, it will save us a lot of time. We have"—I believe he said 12 men or 10 men, some number—"and those men now can concentrate on super markets, chains and jobbers. He said, "Our men are being held up in commissary stores as much as half a day in getting an order." He said, "Also we [104] are having complaints from super markets that we are selling commissary stores direct. We want to get away from that so that the super markets won't be mad at our salesmen, and we would like for someone to take it like yourself and to get the prices up more comparable to super market prices."

And I said, "Well, Howard, that can be done; it will take a little while, because the records we have show the difference between my cost and the cost to super markets—the cost of competitive items of like kind in the commissary stores is 25 per cent. We propose to raise your prices 22 to 20 per cent and sell on that basis."

And I said, "If that is agreeable with you, it is agreeable with me."

He said, "Phillips, you cannot only have it for ten years, you can have it for as long as you can sell."

I said, "I will write you a letter, send you a note to send the information out to the commissary

(Testimony of L. W. Phillips.)

stores and buying officers, and you give me a copy to establish the fact that we are your exclusive military jobber and we will go to work." And we went to work and he sent the letter out.

Q. That was the whole conversation at that meeting with Flynn in early September, was it?

A. Essentially, yes. I said something to him about—I said, "Howard, this is rather a drastic change for us from one kind of business to another. We know that we must have [105] your protection. Don't you think we ought to have a written contract, a written letter or something to establish it with us?"

And he said, "Well, Phillips, you have known Hunt Foods a long time, and our promise is all you have to have." And I had known him for a long time and I let it go at that.

Q. Now, Mr. Phillips, in your deposition you were asked to tell everything that was said at that meeting, and in your deposition you made no reference to this asking for a written contract and his stating that you wouldn't need one.

Mr. Cullinan: There is nothing in the deposition of his asking.

Mr. Rothert: What page is his answer about the conversation? Are you looking at that?

Mr. Cullinan: We will get to that.

Mr. Rothert: I will stipulate that in the deposition there is no reference to putting any agreement in writing.

Q. (By Mr. Cullinan): Isn't it a fact, Mr.

(Testimony of L. W. Phillips.)

Phillips, that at that meeting there was no discussion of the need for a written contract or the idea of a written contract?

A. It is a fact that there was a discussion at that meeting with Mr. Mears—at the one Mr. Mears was present at. I talked about another thing.

The Court: No, there is no question before you.

A. O.K. [106]

Q. (By Mr. Cullinan): Mr. Phillips, I call your attention to page 13 of your deposition, line 8, in which you are testifying about this conversation with Mr. Flynn, and in that part of the answer that I am referring to from lines 8 to 10 on page 13, you said to Mr. Flynn:

“And if we couldn’t have it for five years longer, we don’t want it.”

That means five years after the——

A. Five—first five; two and three. We talked about it first.

Q. So you told him then that there would be no profit for at least two years?

A. Two or three years. We would have to have it for two or three more years, which would make about five, and unless we could have it for five more, which would be ten, we didn’t want it.

Q. Was there any discussion about how you would pay for goods sold to you by Hunt’s?

A. Discussion with who?

Q. With Mr. Flynn at this meeting.

A. No.

(Testimony of L. W. Phillips.)

Q. Was there any discussion at this meeting about credit? A. No.

Q. Or how you would pay for the merchandise?

A. No. [107]

Q. And at the conclusion of this meeting Mr. Flynn told you to go and see Mr. Miller?

A. Sir?

Q. At the conclusion of this meeting with Mr. Flynn, he told you to go and see Mr. Miller?

A. He said to tell Miller that we were all set up, ready to go, to tell Miller of our plans. And that is what he told me, which, I believe, I went down and told Miller.

Q. He sent you to Miller after this meeting and you went down to see Miller?

A. He told me to go see Miller when I could, and I went down there, I believe, the next few days, if I remember.

Q. And you went to see Miller to work out some arrangement to act for Hunt's?

A. No; the arrangement had been worked out when I went to see Miller, because each time I would see him he would send me back to see Flynn.

Q. So all the arrangements then were made at this September meeting with Flynn?

A. That's right.

Q. Now, you said you told Flynn at this meeting that you would make fifteen to \$20,000 that year? A. That's right.

Q. That was in September?

A. That's right. That's right. [108]

(Testimony of L. W. Phillips.)

Q. How did you know at that time that you were going to make fifteen to twenty thousand for that year?

A. My recap of our—you see, in the bidding business you buy something and sell it; you have your gross immediately, you know what it is—if you are going to make \$2,000 here, a thousand dollars here, \$900 here; and I kept a running record of that in a looseleaf binder, so I knew, for the benefit of Overseas Finance and Trading. They wanted to know as being the people that saw we got money. And the first year in our business I kept a running record of that, and at that time I knew how much business we were doing and how much profit we would make from what we had done, and that is what I told him. The fact is that one of those months near that was the largest month of the year we had had. So we knew what we were doing.

We also had contracts that were running to be filled and we knew what we made on those when they were filled. So we could speak with authority then.

Q. So you kept a current record of your profits in the business? A. The first year.

Q. During that year?

A. Yes, sir, so we knew what we were doing. We had to answer to Overseas because we had only been in business for a year.

The Court: You have answered it; you did keep a record. [109]

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Now, then, you went down to see Mr. Miller after meeting with Mr. Flynn; I forget whether that was September 9th or 19th; it was some little time after that meeting here? A. Yes, sir.

Q. At that meeting with Mr. Miller was there any discussion about how you were going to pay Hunt's? A. No.

The Court: Gentlemen, I will have to take an adjournment a little early today because I have had a lot of trouble with my teeth and I have to be at the dentist at 4:00 o'clock. And you know how the dentists are, they are worse than judges on time. So we will have to call it quits a little bit early today.

Mr. Rothert: That is satisfactory, your Honor.

Mr. Cullinan: Fine.

The Court: We will meet tomorrow at 10:00 o'clock, then.

(Whereupon, an adjournment was taken until Tuesday, November 29, 1955, at 10:00 o'clock a.m.) [110]

November 29, 1955—10:00 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Rothert: Ready.

Mr. Cullinan: Ready.

L. W. PHILLIPS

resumed the stand in his own behalf; previously sworn.

Mr. Cullinan: Do you prefer to continue with the cross-examination up to the point of damages or do you prefer to go into the issue of damages question?

Mr. Rothert: Just for my own preference, I would prefer to postpone it.

The Court: I think you might just as well complete your examination on the issue of liability first.

Mr. Cullinan: All right, your Honor.

Cross-Examination
(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, when you talked with Mr. Flynn in September of 1951 you knew that he handled the Northern California territory for Hunt Foods? A. Yes, sir.

Q. But you testified on your direct that at that meeting he asked you if you would take over the western states? A. That's right.

Q. It was not within his jurisdiction, to your knowledge, was it? [112] A. That's right.

Q. After the meeting of September, 1951, with Mr. Flynn, you went to see Mr. Miller in Los Angeles? A. That's right.

Q. That was your next contact with a representative of Hunt's Foods, and Mr. Flynn had told you to go down there to see him; isn't that right? A. That's right.

(Testimony of L. W. Phillips.)

Q. And you had never met Miller before?

A. I had met Miller in early August.

Q. That is on the occasion with Mr. Reed?

A. Yes, sir.

Q. That was the meeting in the coffee shop at Fullerton?

A. Well, we ended up in the coffee shop for a cup of coffee. I met him in his office, being introduced by Mr. Reed.

Q. That meeting with Mr. Miller—that was after the meeting with Mr. Flynn—that is after meeting with Mr. Flynn—that meeting just lasted a few minutes?

Mr. Rothert: Mr. Cullinan, are you talking about the first or second meeting with Miller?

Mr. Cullinan: The second meeting after the meeting with Mr. Flynn.

Mr. Rothert: He met with Flynn twice and Miller twice.

Q. (By Mr. Cullinan): After the September, '51, meeting with Mr. Flynn? [113] A. Yes.

Q. When you went down to see Mr. Miller, that meeting with Mr. Miller lasted just a few minutes, as I understood your direct testimony?

A. I believe that is right.

The Court: You have already covered that, counsel, I believe.

Q. (By Mr. Cullinan): Well, if the arrangement was made with Mr. Flynn in September, why did you go down to see Mr. Miller?

(Testimony of L. W. Phillips.)

A. He asked me to go see him to advise him that it was all right; that Flynn was going to O.K. it and have us handle it up here.

Q. Nothing was final, then, with Mr. Flynn? You had to go see Mr. Miller?

Mr. Rothert: I object on the ground it calls for the witness' conclusion and opinion, argumentative.

The Court: Yes; sustained.

Q. (By Mr. Cullinan): Mr. Phillips, on the occasion of the taking of your deposition, and I am referring now to page 32, line 21—page 32, line 21, to page 33, line 22—no, I withdraw that for a moment.

The next meeting you had with a representative of Hunt Foods was the meeting with Mr. Church on September 21st; isn't that so? That is, after the meeting we have just [114] mentioned with Mr. Miller?

A. Well, it is possible that I could have talked by telephone to Mr. Steiger or Mr. Flynn in the interim, because Mr. Steiger, I believe, advised me to go down and see Mr. Church, and that letter I wrote covered that appointment. I believe he must have called me or I called him during that interim somewhere in there, because the letter said Mr. Steiger asked.

Q. In your letter of September 17, 1951, which is Plaintiff's Exhibit No. 1 in evidence, you offered to answer any questions that Mr. Church may have. You went down to see Mr. Church?

A. That's right.

(Testimony of L. W. Phillips.)

Q. To discuss methods of payment, did you not?

A. To discuss the—according to the letter, I went down to discuss any points in the letter he might want to ask about our business or about us.

Q. In that letter you say, “I would like to call you on you Friday, September 21st, to answer any questions you may care to ask”?

A. That’s right.

Q. You went down to discuss how you were going to pay for merchandise sold to you by Hunt Foods?

A. I went down to let him discuss it if he wanted to; it was his problem. He was going to talk to me; he went down [115] to ask me questions pertinent. I went down, and whatever he wanted to ask me he did.

Q. And at that meeting Mr. Church said that he was going to give you a \$2,000 credit limit, did he not? A. No.

Q. How much? A. 5,000.

Q. \$5,000 credit limit. And at that meeting he told you that you would have to pay for the goods ten days after being invoiced for them, did he not?

A. He told me their discount period was ten days after invoice.

Q. He told you that his discount period was ten days? A. Yes, sir.

Q. Did he offer you a discount on a ten-day basis?

A. He didn’t offer us anything; he just said his

(Testimony of L. W. Phillips.)

discount period was ten days, which we already knew.

Q. Was there any discussion of your paying ten days after an invoice? A. Yes.

Q. I call your attention, Mr. Phillips to your deposition, page 31, lines 1 to 3—this question refers to this meeting:

“Q. Was there any discussion of paying ten days after invoice? A. No.” [116]

A. And what date is this?

Q. This is the meeting with Mr. Church on September 21st.

A. I believe I have corrected it over here, both points I knew later. I also said in that deposition that there was no cash discount offered. In looking over our records, we found out a cash discount was offered on our invoices and that is corrected in my copy.

Q. Mr. Church told you, did he not, that you would have to pay ten days after invoice? That was his terms to you?

A. No, no; he didn't say that we would have to pay that. He said that was their terms—cash discount terms.

Q. Did you suggest any different method of paying at that meeting?

A. No; we told him we would pay them when we could.

Q. You told Mr. Church you would pay him when you could?

A. As we could. As we collected our money and

(Testimony of L. W. Phillips.)

we could give it to him, we did. And that is the terms we worked on all along.

Q. And Mr. Church was agreeable to that?

A. He didn't say yes or no as far as I remember. He said to go ahead and do the best we could.

Q. When you started purchasing from Hunt Foods your invoices were stamped, "Payable in 10 Days," were they not?

A. That is right; always.

Q. Right from the start? [117]

A. Automatic stamp, yes, sir.

Q. And you didn't make any protest to stamping your invoices that way, did you?

A. No; all invoices we ever got from anybody were stamped like that.

Mr. Cullinan: I move to strike the balance. It is obviously calling for a yes or no answer.

The Witness: O.K.

The Court: Very well.

Q. (By Mr. Cullinan): Did you ever pay an invoice to Hunt's within ten days after billing?

A. Our records show we paid some.

Q. I call your attention to your deposition, page 38, line 26, to page 39, line 4:

"Q. This letter is dated March 6th, 1952, from you to Mr. Church where you refer to some other payment basis. Wasn't your payment basis at that time ten days after invoice?"

"A. No; we never paid an invoice to them in our life in ten days."

(Testimony of L. W. Phillips.)

A. Well, I have corrected that, because I looked over our records and I find four or five we paid out of the probably four or five hundred that I didn't know anything about when I made that statement.

Q. So that answer was incorrect? [118]

A. That's right; we paid probably four or five invoices. We probably paid \$2,000 of the hundred thousand we paid them.

Q. Mr. Phillips, at that meeting with Mr. Church you gave him, did you not, your 1950 financial statement—partnership statement?

A. Well, when did I meet with Mr. Church? Is that date '51?

Q. On September 21st, 1951. At that meeting you gave Mr. Church a 1950 financial statement?

A. That's right; no doubt I did.

Q. Well, you so testified?

A. He got it, anyway. I think we sent it to him or he had it anyway.

Q. That 1950 financial statement was for a period of three months, wasn't it, October, November and December, 1950?

A. I believe that's right.

Q. And that is all the financial information Mr. Church had at that meeting, isn't that so?

A. I believe that's right, except the questions he asked me.

Q. Is it your testimony that Mr. Church, having a 1950 partnership statement almost a year old covering a three-months' period and not knowing

(Testimony of L. W. Phillips.)

you before, told you you could pay him when you were able and that there was no limit to your credit?

A. He didn't say no limit on the credit; he told me to pay as soon as we could; that they would try to stand back of us [119] in this commissary sales.

Q. When you left that meeting you understood, didn't you, that Hunt's was going to expect payment ten days after invoice?

A. No; that would have been impossible for me to have understood that. It was also impossible for me to understand the \$5,000. I told him that was impossible because that would be used the first week.

Q. Just a minute. You have answered the question. Now, I want to get this clear. Is it your testimony, then, that the head of the credit department of Hunt Foods told you you could pay when you were able and did not place a limit on the credit that they would extent to you?

A. That's my testimony and the record bears it out.

Q. So as far as you are concerned, there were no specific times of payment agreed to at that meeting?

A. That's right, sir.

Q. Now, Mr. Phillips, I hand you a letter of March 6, 1952, from you to Mr. Church and ask you if that is a letter which you sent to Mr. Church?

A. Yes, I typed this. This is some more of my typing and I mailed it.

Q. Now, Mr. Phillips, I call your attention to the first sentence in the second paragraph:

(Testimony of L. W. Phillips.)

“We are wondering if it is possible for some other payment basis to be worked out to allow us a [120] little more time for payment due to the slowness of army payments coupled with the fact that when we received your invoices after which we billed the army basis, there is only in most instances three or four days before payment is due Hunt’s Foods.”

Having that sentence in mind, you asked for some other payment basis. To me that means there was a payment basis between you, wasn’t there?

A. Cash discount.

Mr. Rothert: To which we object, your Honor, as incompetent what Mr. Cullinan interprets it to be, and he shouldn’t ask the witness whether Mr. Cullinan’s——

The Court: Well, it is argumentative.

Mr. Cullinan: Yes, sir.

Q. A payment basis other than what?

A. Than the cash discount basis of ten days. We were trying to get another two per cent apparently there.

Mr. Cullinan: I move to strike the part of the answer that says, “apparently he was trying to get another two per cent.”

The Witness: We were trying to get two per cent. That’s for sure—extended when we paid it.

Q. (By Mr. Cullinan): Let me ask you again: When you referred to a payment basis, another payment basis, you wanted a basis other than [121]

(Testimony of L. W. Phillips.)

what? A. Two per cent ten days.

Q. And that was the basis on which you were being sold?

A. The invoices were stamped that way. To get a cash discount of two per cent was quite a profitable thing. It would be natural we would try to get two per cent in thirty days or 45 days or when it was paid because we weren't making a dime on the thing and we wanted it.

Q. Now, in the first sentence of the third paragraph of this letter you say:

“Could we take an additional week or so?”
Now, additional to what?

A. To the ten-day period, apparently.

Q. So there was a ten-day period under which you were to pay Hunt?

A. Cash discount period.

Q. Do you find any reference in this letter to a cash discount?

A. No, but in the terms of the trade that is what you generally talk about the terms or the cash discount terms.

Q. So you can't tell us, or can you tell us, this additional week was additional to what?

A. To the two per cent.

Mr. Rothert: I think that is answered. He said——

A. In order to get the cash discount. As a rule, bills are paid—— [122]

The Court: No.

(Testimony of L. W. Phillips.)

Mr. Cullinan: Just a moment. You have answered.

Mr. Rothert: Try to limit yourself to the answers, Mr. Phillips.

A. O.K.

Mr. Rothert: And don't volunteer other statements.

Mr. Cullinan: I would like to introduce this letter of March 6, 1952, as our next exhibit in order.

(Letter of March 6, 1952, was thereupon received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, I hand you a copy of a letter dated March 14, 1952, from Mr. Church to you. You received that letter, did you not? A. Yes, we received the letter.

Q. I call your attention, Mr. Phillips, to the last paragraph of this letter:

"We prefer any agreement to give you additional time on shipping to army bases until we receive up to date financial information as our decision will depend entirely upon the figures which you furnish us."

There is a reference here to additional time. That is additional to the ten days?

A. That's what I was talking about here. What he was talking about there, I don't know. [123]

Q. Incidentally, you testified on direct that you were able to tell Mr. Church that your income would be \$15,000 or \$20,000 for the year 1951 and that

(Testimony of L. W. Phillips.)

meeting was in September and that you could figure your income would be that because you had current information as to how your business was doing, didn't you?

A. That's right. I made that statement to him.

Q. Why, at this meeting of September 21st, if that were so, was it a 1950 statement that you gave Mr. Church?

A. Because we did not make a statement—I had no statement with me for the months I was talking about. I had only my records I kept. That is why I made the statement to Mr. Church. He asked it.

Q. You didn't have your records with you?

A. No.

Q. But you could tell Mr. Church you were going to make 15 to 20 thousand dollars?

A. That's right.

Q. Which happens to be the amount that you did make? A. That's right.

Q. And this was in September?

A. That's right.

Q. But you didn't give him any of that information; you gave him a 1950 three months' statement; isn't that so?

A. I gave him the record we had. [124]

Mr. Cullinan: I would like to introduce the letter of March 14th just referred to from Mr. Church to Mr. Phillips.

(Whereupon, letter of March 14th, 1952, was received in evidence and marked Defendant's Exhibit B.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, I show you a letter of April 22, 1952, a copy of a letter, from Mr. Church to you. A. April, '52?

Q. April 22, 1952. A. We got this one.

Q. You got that letter? A. Yes, sir.

Q. I call your attention to the last sentence of the next to the last paragraph of this letter:

“We have no alternative but to insist that all purchases now being made be paid for within our regular terms, that is, ten days from date of invoice.”

Those were the regular terms of Hunt's, weren't they?

Mr. Rothert: I will object on the ground that that calls for the witness' conclusion as to what Hunt's regular terms were.

Q. (By Mr. Cullinan): Those were your terms with Hunt's, weren't they?

A. They were the cash discount terms. [125]

Q. But there is no reference in this letter to cash discount?

A. No, but when you speak of terms——

Mr. Cullinan: I offer this as our next exhibit.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Cullinan): I show you a letter dated May 1st, 1952, from you to Mr. Church. That

(Testimony of L. W. Phillips.)

is the letter which you sent to Mr. Church on that date, is it not?

A. Yes, sir; I dictated this letter. It was written by my secretary and signed by her but I dictated the letter.

Q. At this time you owed considerable money to Hunt Foods, did you not?

A. The record will show; I don't know exactly what it was.

Q. It was in the neighborhood of \$25,000, was it not?

A. I don't know that. I would have to see the books.

Q. You had suggested that an assignment of accounts receivable from you to Hunt's might be helpful, did you not?

Mr. Rothert: You mean he had before this letter?

Mr. Cullinan: Before this letter, yes.

A. I might have mentioned it prior to the time they got our financial statement in May, which was late. Our financial statement for 1951 was not made until May of '52, as you know.

Q. So as of this time—— [126]

A. And in the interim there——

Q. Just a minute. A. O.K.

Q. Prior to May 1st of '52 you had suggested an assignment of accounts receivable for the protection of Hunt's, did you not?

A. I did. I think I did, yes.

Q. In this letter of May 1st, 1952, you say, "Re

(Testimony of L. W. Phillips.)

your letter of April 22nd and my phone call concerning same.”

A. Read that again. Could I have that again, please?

Q. It starts off, “Re your letter of April 22nd” —that is Defendant’s Exhibit C, just introduced.

A. Yes.

Q. —“and my phone call concerning same.” That is the opening paragraph. The next paragraph:

“I realize such reports as you have had would make any credit department look with a certain amount of concern on such conditions and I appreciate you writing me as you did so we may get the record straight on paper direct from the operation itself, and I appreciate further the fact that the only thing in the world you have been extending credit on so far has been my word of honor that we would pay and that in most instances is not enough for you as I well realize that you operate with certain rigid credit [127] rules, and if perchance we did not pay, the common saying is ‘someone’s neck would be way out.’ As I have said above, words, of course, cannot express my sincere thanks to you for your very liberal attitude towards us.”

At this time, then, you were seeking to have an arrangement by which you would assign accounts

(Testimony of L. W. Phillips.)

receivable and take the pressure off you for the payment of your account?

A. Take the pressure off of Hunt's credit department. The pressure was there.

Q. You did in May assign to Hunt's certain invoices, did you not?

Mr. Rothert: Are you going to introduce that last letter in evidence?

Mr. Cullinan: Yes.

(The letter of May 1st, 1952, was thereupon received in evidence and marked Defendant's Exhibit D.)

Q. On May 12, 1952, Mr. Phillips, you did execute an assignment, a document entitled, "Assignment of Accounts Receivable," did you not?

A. Yes, sir; which proved to be erroneous.

Mr. Cullinan: I am just asking you if you did, and I move to strike the balance of the answer.

The Court: Yes, it may go out.

Q. (By Mr. Cullinan): You were assigning to Hunt's certain [128] invoices for their protection?

A. Give me the total of those invoices.

Mr. Rothert: Well, that is not the answer. Did you assign certain invoices?

The Court: Did you make an assignment of accounts receivable to them?

A. Yes, sir; \$12,000.

The Court: You have answered it. [129]

Q. The moneys that were paid on those invoices

(Testimony of L. W. Phillips.)

were to be paid by you to Hunt's as you got them, weren't they?

A. Paid by us to Hunt's, yes, which we did.

Q. You were to pay those moneys for Hunt's and pay them to Hunt's after you got them?

Mr. Rothert: I think the assignment speaks for itself, your Honor, and it calls for the witness' conclusion as to its legal effect.

Q. (By Mr. Cullinan): Was it your understanding, Mr. Phillips, that these moneys on the assigned invoices were to be delivered by you to Hunt's as you got them?

The Court: What difference does it make, Counsel? If that is what the agreement provided, that is what is binding.

Mr. Cullinan: I will introduce this as our Exhibit next in order.

(Document referred to was thereupon received in evidence and marked Defendants' Exhibit E.)

Q. (By Mr. Cullinan): Referring to your deposition, page 32——

The Court: This assignment does not provide that Phillips shall collect the accounts. This is an assignment of the accounts receivable which gives to Hunt's Foods the right to collect.

Mr. Cullinan: Yes, I was coming to that, your Honor. We might as well cover that right now.

Q. Mr. Phillips, under the assignment you were authorized [130] and you were expected to collect

(Testimony of L. W. Phillips.)

the amounts due on these invoices yourself, were you not?

Mr. Rothert: I think that calls for the conclusion of the witness.

Mr. Cullinan: I am asking him what he expected.

The Court: I am not concerned with that. Ask him what was done with the assignment.

Q. (By Mr. Cullinan): Under the assignment, Mr. Phillips, you collected the various invoices?

A. As shown on that paper?

Q. As shown on this paper or other invoices that followed.

Mr. Rothert: I object on the ground that the other invoices that followed are not pertinent to the assignment, and, therefore, it is a compound question.

Q. (By Mr. Cullinan): Mr. Phillips, this assignment——

A. May I see the paper.

Q. Yes. This assignment lists certain specific numbered invoices?

A. Yes, sir.

Q. Will you read the wording right under that at line 16?

A. Yes.

Q. That says, "and all amounts which may become due and owing to Wellington Phillips and Company, a partnership, in the future arising out of the sales of goods, wares and merchandise by Wellington Phillips and Company, a [131] partnership, purchased from Hunt Foods." It contemplated subsequent invoices?

A. May I give you some information on this?

(Testimony of L. W. Phillips.)

Q. No.

The Court: You spend a lot of time arguing back and forth. Just get the facts. I am not trying to limit your examination, but to get into an argument with the witness is not helpful. What you are trying to find out, I take it, is what actually happened with respect to the collection of these accounts.

Mr. Cullinan: Right.

The Court: Ask him about it.

Q. (By Mr. Cullinan): You selected these accounts, did you not, these and other accounts subsequent to the assignment? A. No, no.

Q. You did not collect these accounts?

A. That is right.

Q. You collected none of these accounts?

A. We collected some of them.

Q. Can you tell us which ones you did not collect?

A. The first two, one for \$8,903, and \$12,000.

Q. The first two items? A. Yes.

Q. Those first two items are what you designated as prebilled, are they not? [132]

A. That is right, they held the merchandise.

Q. They set aside merchandise for you under the prebilling and held them subject to your order?

A. That is right.

Q. These first two total approximately \$12,000?

A. Yes, sir.

Q. Subsequently you were credited back with about \$6,000 of that, isn't that so?

(Testimony of L. W. Phillips.)

A. I don't remember that. The books will show that. I have no idea what that is.

Q. Let us prescind a moment from the first two. The balance of the accounts listed here were collected by you? A. And we paid it to Hunt.

Q. But not as you received it.

A. I believe we paid to Hunt—I wouldn't swear to that, but we paid that money to Hunt. That account has been cleared.

Q. Mr. Phillips, in your direct testimony you said——

The Court: I do not want to interrupt your direct examination, but it is not quite clear to me what the value of this is. It has been agreed that the amounts were owing and that trade acceptances were executed for them and some of those were not paid.

Mr. Cullinan: Later on, but this shows that during the course of the dealings with Mr. Phillips it was very [133] unsatisfactory. They would make a credit arrangement with him and it would fall through, and they would have to come through with another one.

The Court: It was unsatisfactory in the sense that he did not pay the amounts that he owed and then executed trade acceptances for them and some of them were not paid.

Mr. Cullinan: Yes.

Mr. Rothert: That was after.

The Court: There is no dispute about that. I am just wondering what——

(Testimony of L. W. Phillips.)

Mr. Cullinan: The dispute is really threefold: First, it is Mr. Phillip's position that he had no set time in which he had to pay anything.

The Court: I don't quite see the importance of that in this particular controversy, since it is admitted, and there is no dispute about the fact of these purchases, some of which were covered by accounts receivable. The payments were not made, and subsequently trade acceptances were issued for—I believe that was after the termination of the agreement—at the time he was terminated he did owe money that he had not paid. Now, there is no dispute about that. I just do not know what the good is of spending time emphasizing it, unless the claim is made by the defendant that the relationship was terminated because of the failure to pay. But I do not see, since it is not disputed that there was a [134] failure to pay and that there was money owing at the time of the termination which had not been paid, what need there is to take up time in proving something that is not disputed.

Mr. Cullinan: All we were going to prove, your Honor, was that he had not paid, that he agreed to pay right from the start. We finally worked out this arrangement, and then he failed completely on this arrangement, so that during the year or so of the dealings, why, this is one of the kinds of problems were were running into with Mr. Phillips.

The Court: If you terminated the relationship on that basis, that is one of the questions, I suppose, of fact that may be involved, but the fact that there

(Testimony of L. W. Phillips.)

was a failure to pay and money owing is apparently not in dispute.

Mr. Cullinan: The reason for termination, as will be proved—there are many reasons. This is one of them. We will leave the accounts receivable for the moment.

Q. Mr. Phillips, on your direct testimony yesterday you said that after your meetings in August you obtained a price list and you made an analysis of the Hunt lines in the commissaries or the sales of canned goods in commissaries?

A. That is right.

Q. That was in August and before your meeting with Mr. Church? A. Yes.

Mr. Rothert: I don't know if he heard the [135] question.

Mr. Cullinan: The answer was "Yes."

The Witness: I answered "Yes."

Q. (By Mr. Cullinan): In your deposition, from page 32, line 21, to page 33, line 22, you were asked about after the meeting with Church:

"Q. Now, when did you next meet with the representatives of the Hunt Foods? The date which we are talking about there was September what?

"A. September 21. I would say the next time I talked with Hunt's at all would have been a phone call from our office at Hayward, and I don't know that time.

"Q. Would that have been some time shortly after this meeting? A. Yes.

(Testimony of L. W. Phillips.)

“Q. With whom did you talk?

“A. Well, I don’t remember that. I couldn’t possibly remember those things.

“Q. Well, do you remember what the purpose of that particular call was?

“A. The purpose of those calls was to get price lists, samples and of that nature, to start selling, set up our selling force, trying to find out what items were sold.”

Is that true? Was that the purpose of the call, or didn’t [136] you have that information?

A. What items were sold?

Q. You stated after your meeting with Church you made some phone calls to find out the price lists and try to find out what items were sold.

A. To get the price lists. I should have said up-to-date price lists, and when I said what item was sold, I meant what items had been sold since I had been in to see them, the commissary stores.

Q. Had the price lists been changed?

A. It could have been changed every day or two, oh, yes, and sales were made every week.

Q. But this was after your meeting with Mr. Church? A. That is right.

Q. But you testified yesterday that you told Mr. Flynn earlier in September that the price lists were about the same as your costs?

A. That is right.

Q. But it was after your meeting with Flynn and with Church that you were to get to the price lists?

(Testimony of L. W. Phillips.)

A. An up-to-date price list. Hunt changed them every few days, and in order to keep current you had to go back and get other lists.

Q. Isn't it a fact, Mr. Phillips, you did not know the price lists until about three weeks after your meeting with [137] Mr. Church?

A. My friend, I knew the price lists six months before I ever called.

Q. You testified on your direct that in the survey you made in August you ascertained that the merchandise that the commissaries were buying, didn't you? A. That is right.

Q. I will call your attention to your deposition, page 35, lines 3 to 8, where this question and answer were given:

“Q. After that November 12th or November 13th meeting, when did you next meet with a representative of Hunt's?”

“A. Well, it was possible that after that I might have been over at Hayward finishing up our plant and getting a list of merchandise the commissaries had bought and what they had paid for it.”

A. That is right, yes, sir.

Q. So you did not have that information until November 12th or 13th?

A. Every week and every month we bought. We did it to get the current purchases, and that was what we were after there, the current prices. We had to contact them every few days before we

(Testimony of L. W. Phillips.)

started in order to get current purchases and their current prices and their current available stocks.

Q. After you started purchasing Hunt products, Mr. Church [138] frequently asked you for up-to-date financial statements, did he not?

A. The letters show that he did once or twice. I wouldn't say how frequently.

Q. When did you next give him a financial statement? A. After I saw him——

Q. After your September 21st meeting?

A. Mr. Willy sent him the statement, I believe, in the month of May when it was finished.

Q. That would have been the partnership income statement for the year 1951?

A. That is right, sir.

Q. And he got that in the middle of May, 1952?

A. Well, I didn't know when he got it. I have no recollection of that. He got it during May, I believe.

Q. Mr. Phillips, one more question about the accounts receivable. In your deposition, page 48, lines 15 to 18, when you were speaking of the assignment of accounts receivable at that time and you were asked, "That was for the protection of Hunt's?"

"A. That is right, that is right.

"Q. And how was it to protect Hunts? How did you understand it was to protect Hunt's?

"A. Well, to be honest with you, I never knew how it was because we never paid any attention to it. [139]

(Testimony of L. W. Phillips.)

“Q. Neither did they?

“A. That is right.”

You never paid any attention to the accounts receivable assignment?

A. We paid off what was here, but according to them, the interpretation you made, we didn't pay attention to that because we didn't know. We paid what was on this list.

Q. (By the Court): You mean after the specific amounts that were covered by the written assignment had been taken care of, thereafter you did not pay any attention to the assignment of the accounts receivable?

A. No, sir, because I didn't understand it.

Q. (By Mr. Cullinan): And Mr. Phillips, didn't Mr. Church call you many times after this assignment to say that you were not remitting the money as you got it on the items assigned?

A. From the 15th of May, when we got our financial statement down to him? After that?

Q. Yes.

A. I would say he didn't call us very many times if at all. I don't remember him calling us at all. Mr. Steiger would call and say something about payment of certain accounts that were a little old. We would check up and probably send it in. Mr. Steiger watched that thing at this end.

Q. Prior to that assignment Mr. Steiger came to your office and told you that Hunts would not sell you any more [140] merchandise until you paid up your account, didn't he?

(Testimony of L. W. Phillips.)

A. I don't remember that.

Q. But you won't say it did not happen?

A. I don't remember. Paid up the account? That he wouldn't sell us any more?

Q. Until the account was paid up.

A. Well, we didn't pay it up, and we got the merchandise, so I don't know.

Q. Mr. Phillips, you never had a written contract with Hunts, did you?

A. No, not according to the interpretation——

The Court: You have answered.

The Witness: I am sorry.

Q. (By Mr. Cullinan): Isn't it a fact that the only arrangement you had with Hunt was that you were to buy their goods and resell them to the commissaries, and that either one of you could terminate it at any time? A. No.

Q. And that is the customary kind of jobber's arrangement, is it not?

A. No, not exclusive jobber arrangement. That is a jobber arrangement. Exclusive jobber arrangement is a different matter.

Q. Let me refer you to Plaintiffs' Exhibit 1, which was the letter of September 17th, 1951. No, not that. October [141] 2nd. I will show you a letter of October 2nd, 1951, from you to Mr. Wally Reed. Mr. Reed was then at Hunt Foods, was he not? A. That is right.

Q. And he is the Mr. Reed that you mentioned yesterday?

(Testimony of L. W. Phillips.)

A. That is right. I wrote the letter and my secretary signed it.

Q. The last paragraph of that letters states, "It is our aim to promote energetically and continually the Hunt label at all times exclusive in return for the above privilege."

You regarded this not as a contract but as a privilege——

A. We are getting into another field.

Mr. Rothert: Just a minute. I want to make an objection right after he finishes his question, Mr. Phillips.

The Witness: Go ahead.

Q. (By Mr. Cullinan): You regarded the arrangement as a privilege which either one could terminate, didn't you?

Mr. Rothert: May I object on the ground it is ambiguous whether the arrangement he is referring to is the arrangement stated in the letter of October 2nd or the arrangement that Mr. Phillips has testified about that he had with Mr. Miller and Mr. Flynn.

The Court: Counsel asked him a question. I know how he is going to answer it. It is in the argumentative field. I don't want to be didactic, gentlemen, but when you ask an [142] argumentative question, you get an argumentative answer. It is no help to the Court because all I am interested in is getting the facts. It would not make any difference how you felt about it or how he felt about

(Testimony of L. W. Phillips.)

it. It is for the Court to decide what the arrangement was.

Q. (By Mr. Cullinan): It was your understanding of your conversations with Hunt personnel——

A. Mention the name, please.

Q. Mr. Flynn, Mr. Miller—that what you had was a terminable privilege to sell Hunt Food products?

A. No, that letter is Mr. Reed's letter, export department, overseas bases only.

The Court: You are arguing, if you will please stop that, because it takes up so much time and you have able counsel to represent you. They will do the arguing.

Mr. Cullinan: May I ask the Court if that letter of October 2nd is in evidence?

The Court: It has not been offered yet.

Mr. Cullinan: Your Honor, if this is an appropriate time for a recess, I would like to get the correspondence.

The Court: We will take a brief recess.

(Recess.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, to shorten this up a little bit, you did not in any letter written to Hunt Foods in 1952, you at no time in any of those letters claimed [143] any contract with Hunt Foods, did you?

A. I don't believe I did. No, I don't think I wrote a letter about it at all in 1952.

Q. Exhibit A, a letter of March 6th, 1952, where

(Testimony of L. W. Phillips.)

you are asking for additional time for payment, there is no mention of a contract in that letter, is there? A. No.

The Court: Counsel, you just leave the door open for argument when you ask the witness a question whether there is any mention. Your letter speaks for itself and you can point out to the Court what you have in mind in that regard.

Mr. Rothert: I will stipulate to that, your Honor.

Q. (By Mr. Cullinan): I will hand you a letter of May 1st, 1952. It is a photostat of a letter from you to Mr. Church. That letter was written by you, was it not?

A. That is right. My secretary wrote it and she signed it, but I dictated it.

Mr. Rothert: Defendants' Exhibit D, isn't it?

Mr. Cullinan: Yes, we offered that.

Mr. Rothert: Isn't that already in?

Mr. Cullinan: Oh yes, that is already in.

The Court: Yes, that is already in.

Q. (By Mr. Cullinan): I hand you a letter dated May 21st, 1952, Mr. Phillips, from you to Mr. Conrad with copies to Mr. Church and Mr. Howard Flynn. [144]

Mr. Rothert: It is a letter to Mr. Phillips?

Mr. Cullinan: From Mr. Phillips to Mr. Conrad with copies to John Church and Howard Flynn.

Mr. Rothert: May I see that?

Mr. Cullinan: You do not have this one?

Mr. Rothert: No.

(Testimony of L. W. Phillips.)

The Court: Has the letter of October 2nd, 1951, from Phillips to Reed been offered in evidence?

Mr. Rothert: No, sir.

The Court: You have referred to it.

Mr. Cullinan: Yes, I will offer that in evidence.

The Court: Do you want to do that now? I think it is lying on the desk there.

Mr. Cullinan: This is in evidence. This is May 1st. That is March 6th.

The Court: Do you wish to offer the letter of October 2nd 1951, or are you just referring to it?

Mr. Cullinan: I am going to offer it, your Honor.

The Court: I have made a note of it. You referred to it but you did not proceed any further.

Mr. Cullinan: This is the letter of May 21, 1952, from Mr. Phillips to Mr. Conrad.

The Witness: May I see the letter again?

Mr. Cullinan: This is the one you just saw.

The Witness: Yes, I would just like to see something. [145] The numbers mentioned here are on the side.

Mr. Rothert: There is no question, Mr. Phillips. Wait until he asks you something.

Mr. Cullinan: I will introduce this as our next exhibit in order.

(The letter referred to, dated May 21, 1952, from Phillips to Conrad, was thereupon received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Cullinan): I will show you a letter

(Testimony of L. W. Phillips.)

from you to Mr. Church, which is undated, but stamped at Hunts "Received June 9th, 1952," and I will ask you if that is a letter you wrote to Mr. Church? A. That is right. I wrote the letter.

Q. And that would have been in June of 1952. It is undated but it is stamped "Received June 9th, 1952." A. That is right.

Mr. Cullinan: I will offer that as our next exhibit.

(Letter referred to stamped June 9th, 1952, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, in the latter part of April, 1953, a representative of Hunts stated they were no longer selling to you for resale to commissaries, is that so?

A. Yes. [146]

Q. Mr. Steiger and Mr. Miller informed you of that? A. Mr. Steiger informed me.

Q. Wasn't Mr. Miller present?

A. Mr. Steiger called us on the telephone.

Q. Did you have a meeting with Mr. Miller and Mr. Steiger at the time of the termination ?

A. At that time?

Q. Yes. A. Not that time.

Q. What was it, the next day?

A. I don't remember.

Q. I will hand you a letter dated April 15th. It is dated 1853 but I assume it was 1953.

(Testimony of L. W. Phillips.)

The Court: April 15th, 1953?

Mr. Cullinan: Yes, your Honor.

Q. That is the letter from you to Mr. Lee Miller?

A. That is right.

Q. And that is a copy of the letter. That letter was sent? A. I wrote the letter.

Q. That is a copy to Mr. Steiger?

A. Well, I don't know whether he got the copy or not. I wrote the letter.

Q. And you sent a copy of it to Mr. Steiger, did you not? I will show you the postscript. Is that postscript in your handwriting? [147]

A. That is right.

Q. "Dear Steiger—Dear Ed, for your information." A copy of this letter from Mr. Miller was sent to Mr. Steiger?

A. That apparently was a copy.

Mr. Cullinan: We will offer this as our next in evidence.

(The letter referred to, dated April 15, 1953, from Phillips to Miller, was thereupon received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Cullinan): I hand you a letter, Mr. Phillips, dated June 1st, 1953, from you to Mr. Church and ask you if that is the letter you sent to Mr. Church on that date? A. That is right.

Mr. Cullinan: I will offer that as our next in evidence.

(Testimony of L. W. Phillips.)

(Letter dated June 1st, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit I.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated June 15th, 1953, to Mr. Church, attached to which is a copy of a partnership income tax return of 1952, and I will ask you if that is the letter which you sent to Mr. Church?

A. Yes, sir.

Mr. Rothert: May I see that? I have a copy of the letter but I do not have a copy with a partnership return on it.

Mr. Cullinan: We offer this as our next exhibit, your [148] Honor.

(Document referred to, a letter dated June 15th, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit J.)

Q. (By Mr. Cullinan): I hand you a letter also dated June 17th, 1953, from you to Mr. Church.

Mr. Rothert: I do not think I have that.

The Court: A letter to whom?

Mr. Cullinan: To Mr. Church, June 17th, 1953.

A. I wrote that, typed it myself.

Mr. Cullinan: I offer this as our next in evidence.

(The document referred to, a letter dated June 17th, 1953, from Phillips to Church, was

(Testimony of L. W. Phillips.)

thereupon received in evidence and marked Defendants' Exhibit K.)

Q. (By Mr. Cullinan): I will hand you, Mr. Phillips, a copy of a letter from Mr. Church to you dated June 30th, 1953, and ask you if you received that letter?

A. That is right, we received this letter.

Mr. Cullinan: I will offer this as our next exhibit.

(Document referred to, a letter dated June 30th, 1953, from Mr. Church to Mr. Phillips was thereupon received in evidence and marked Defendants' Exhibit L.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated July 2nd, 1953, from you to Mr. Church and ask you if that is a letter you sent to Mr. Church? [149]

A. I sent this to Mr. Church, yes, sir.

Mr. Cullinan: I will introduce that, if I may, as our exhibit next in order.

(The document referred to, a letter dated July 2nd, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit M.)

Q. (By Mr. Cullinan): Now, I hand you a copy of a letter from Mr. Church to you dated July 8th, 1953, and ask you if that is a letter which was received by you?

A. We received this letter, yes, sir.

(Testimony of L. W. Phillips.)

Mr. Cullinan: I will introduce this as our exhibit next in order.

(Document referred to, a letter dated July 8th, 1953, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit N.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a letter dated July 14th, 1953, from you to Mr. Church and ask you if that is a letter which you sent on that date to Mr. Church? A. Yes, sir.

Mr. Rothert: I do not have a copy. May I see it?

Mr. Cullinan: We will offer that as our next in order.

(The document referred to, a letter dated July 14th, 1953, from Phillips to Church, was thereupon received [150] in evidence and marked Defendants' Exhibit O.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated July 28th, 1953, from you to Mr. Church. A. I wrote the letter.

Q. That is your letter? A. Yes.

Q. There is a postscript on this letter, Mr. Phillips. Is that in your handwriting?

A. Yes, I wrote that.

Mr. Cullinan: I offer that as our next exhibit.

(The document referred to, a letter dated July 28th, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit P.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I will hand you a letter dated August 18th, 1953, addressed to "Dear John." That would be John Church, would it not?

A. That is right.

Q. It is dated August 18th, 1953. That is a letter you sent on that date to Mr. Church?

A. Yes, sir.

Mr. Cullinan: I offer that as our next exhibit.

Mr. Rothert: May I see that one?

Mr. Cullinan: I offer that as our next exhibit.

(The document referred to, as letter dated August 18th, 1953, from Phillips to Church, was thereupon received [151] in evidence and marked Defendants' Exhibit Q.)

Q. (By Mr. Cullinan): I will show you a letter of September 3rd, 1953, Mr. Phillips, from you to Mr. Church, with some photostats attached, and ask you first if that is a letter which you sent to Mr. Church on September 3rd, 1953?

A. That is right.

Q. And in it you enclose copies of certain contracts with the government?

A. That is right.

Q. Which are attached?

A. Yes, sir.

Mr. Cullinan: I will introduce that letter of September 3rd as our next in order.

(The document referred to, letter dated September 3rd, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit R.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a letter dated September 23rd, 1953, addressed to Mr. Church signed by you. That was a letter that you sent to Mr. Church on that date?

A. Yes, I did.

Mr. Cullinan: We offer this as our next in order.

(The document referred to, a letter dated September 23rd, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit S.) [152]

Q. (By Mr. Cullinan): I will hand you a letter dated October 5th, 1953, Mr. Phillips, from you to Mr. Church, and ask if that is a letter you sent to Mr. Church on that date? A. Yes, sir.

Q. And that has certain attachments to it, copies of government awards which were attached to the letter.

A. Yes, open end contracts.

Mr. Cullinan: We will offer that as our next in order.

(The document referred to, a letter dated October 5th, 1953, was thereupon received in evidence and marked Defendant's Exhibit T.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, to Mr. Church, dated October 23rd, 1953, with a tape attached to it. That letter was sent by you to Mr. Church? A. I did.

Q. And the tape attached is one that was affixed by you to the letter, is it not? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. The tape attached relates to accounts receivable, accounts owing to you at that time, does it not?

A. The body of the letter explains it.

Q. The body of the letter explains it?

A. Yes, sir.

Mr. Cullinan: We offer this as our next exhibit.

(Document referred to, a letter dated October 23rd, [153] with a tape attached, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit U.)

Q. (By Mr. Cullinan): I hand you a photostat of a letter from Joseph R. Harman to you, the Wellington Phillips Company, dated December 8, 1953.

The Court: From whom?

Mr. Cullinan: Joseph R. Harman.

Q. Joseph R. Harman is the attorney for Hunt Foods, is he not? A. Southern California, yes.

Q. You received this letter dated September 8th, 1953? A. We received that.

Mr. Rothert: Your Honor, I am going to object to this particular letter on the ground it is incompetent, irrelevant and immaterial. It is from an attorney representing Hunt Foods and is about the trade acceptances, which it is, of course, admitted were executed and not fully paid.

Mr. Cullinan: The purpose of this letter, if your Honor please, is this: It will be shown from subsequent correspondence that after an attorney wrote to Mr. Phillips is when he starts claiming a contract in 1954.

(Testimony of L. W. Phillips.)

Mr. Rothert: Except for a letter in March or April, 1953.

Mr. Cullinan: These are two or three letters that are coming in. [154]

The Court: Let me see it. Well, all of these letters are in the nature of an account that is owing. I will overrule the objection.

(The photostat of letter from Harman to Phillips dated December 8th, 1953, was thereupon received in evidence and marked Defendants' Exhibit V.)

Q. (By Mr. Cullinan): I will hand you a letter dated January 6, 1954, from the same Mr. Harman to you and ask you if you received that letter?

A. Yes, sir.

Mr. Cullinan: I will introduce this as our next in order.

Mr. Rothert: I would like to make the same objection as I made to the letter that is now Defendants' Exhibit V, on the grounds it is merely a letter for collection by an attorney for Hunt Foods.

The Court: Well, it is a similar letter. I don't know the importance of it, but let it be marked.

(The document referred to, a letter dated January 6, 1954, from Harman to Phillips, was thereupon received in evidence and marked Defendants' Exhibit W.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a photostat of a letter from you to Mr. Harman

(Testimony of L. W. Phillips.)

dated January 15th, 1953, with a correction to 1954.

A. 1954 is correct.

Q. This copy was given to me by your counsel. Did you write [155] such a letter to Mr. Harman on January 15th, 1954?

A. Yes, sir.

Q. And that letters refers to—

May I see it— to his letter of December 8th, 1953.

(The document referred to, a letter from Mr. Phillips to Mr. Harman dated January 15, 1953, was thereupon received in evidence and marked Defendants' Exhibit X.)

Q. (By Mr. Cullinan): I hand you a letter dated March 2nd, 1954, signed by you and addressed to Harman and Herlands, that is, Mr. Joseph Harman, and ask you if that is a letter which you sent to them on March 2nd, 1954?

A. Yes, sir.

(The document referred to, a letter dated March 2nd, 1954, from Mr. Phillips to Mr. Harman, was thereupon received in evidence and marked Defendants' Exhibit Y.)

Q. (By Mr. Cullinan): I will hand you a letter dated March 5th, 1954, from Mr. Church to you, and with a footnote on it to Mr. Church with your name typed in. Is that a letter which you received from Mr. Church?

A. Yes, sir.

Q. And that footnote was typed by you and the letter sent back to Mr. Church?

A. Yes.

Mr. Cullinan: I will offer that as our exhibit next in order.

(Testimony of L. W. Phillips.)

(The document referred to, being a letter dated [156] March 5, 1954, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit Z.)

Q. (By Mr. Cullinan): I will hand you a letter dated April 15th, 1954, Mr. Phillips, addressed to Mr. Church, and ask you if that is a letter which you wrote to Mr. Church? A. Yes, sir.

Mr. Rothert: What is that date?

Mr. Cullinan: April 15th, 1954.

(The document referred to, a letter dated April 15th, 1954, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit AA.)

Q. (By Mr. Cullinan): I will hand you a copy of a letter dated April 20th, 1954, from Mr. Church to you, and ask you if you received that letter?

A. Yes, sir.

Mr. Cullinan: I will introduce that as our exhibit next in order.

(Document referred to, a letter dated April 20, 1954, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit AB.) [157]

Q. (By Mr. Cullinan): I hand you a letter dated April 23, 1954, from you to Mr. Church and ask you if you sent that letter. A. Yes, sir.

(Testimony of L. W. Phillips.)

(Letter of April 23, 1954, was thereupon received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Cullinan): I hand you a copy of a letter dated April 30, 1954, from Mr. Church to you and ask you if you received that letter.

A. Yes, sir.

(Letter of April 30, 1954, was thereupon received in evidence and marked Defendant's Exhibit AD.)

Q. (By Mr. Cullinan): I hand you a copy of a letter dated June 17, 1954, from Mr. Church to you and ask you if you received that letter.

A. Yes, sir.

Mr. Rothert: I don't have that one.

The Court: What was that one?

Mr. Cullinan: That is June 17, 1954. I will introduce that as our next exhibit.

(Letter of June 17, 1954, was thereupon received in evidence and marked Defendant's Exhibit AE.) [158]

Q. (By Mr. Cullinan): I hand you a letter dated July 10—there is no year on it; it has a July '54 receipt, addressed from you to Mr. Church, and ask you if that is a letter which you sent to Mr. Church on July 10th, 1954. A. Yes, sir.

Mr. Rothert: May I see that one before you offer it?

(Testimony of L. W. Phillips.)

Mr. Cullinan: I offer the letter of July 10th, 1954.

(Letter of July 10, 1954, was thereupon received in evidence and marked Defendant's Exhibit AF.)

Q. (By Mr. Cullinan): I hand you a letter of July 15, 1954, from Mr. Church to you and ask you if you received that letter. A. Yes, sir.

Mr. Rothert: May I see that?

Mr. Cullinan: I offer that as our next exhibit.

(Letter of July 15, 1954, was thereupon received in evidence and marked Defendant's Exhibit AG.)

Q. (By Mr. Cullinan): I hand you a letter dated July 20, 1954, from you to Mr. Church and ask you if you sent that letter. A. Yes, sir.

Mr. Rothert: May I see that before you offer it?

(Private discussion between counsel.)

Mr. Cullinan: I am not offering the letter just referred [159] to at this time, your Honor.

Q. I show you a copy of a letter from Mr. Church to you, Mr. Phillips, dated July 29, 1954, and ask you if you received that from Mr. Church.

A. Yes, sir.

Mr. Cullinan: I will offer that as our next exhibit.

(Letter of July 29, 1954, was thereupon received in evidence and marked Defendant's Exhibit AH.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I hand you a letter dated August 3, 1954, from you to Mr. Church and ask you if that letter was sent by you to Mr. Church.

A. Yes, sir.

Q. And the footnote——

A. Is my writing.

Q. Is your writing? A. Yes, sir.

(Letter of August 3, 1954, was thereupon received in evidence and marked Defendant's Exhibit AI.)

Mr. Cullinan: And I hand you a copy of a letter dated August 9, 1954, from Mr. Church to you and ask you if that was received.

A. Yes, sir, we received that.

(Letter of August 9, 1954, was thereupon received [160] in evidence and marked Defendant's Exhibit AJ.)

Q. (By Mr. Cullinan): I hand you a letter dated September 9, 1954, from you to Hunt Foods, attention Mr. Church, and ask you if you sent that letter. A. Yes, sir.

Q. And the footnote on that letter is in your handwriting? A. Yes, sir.

Mr. Rothert: May I see that one?

Mr. Cullinan: I offer the letter of September 9th, your Honor, as Defendant's next in order.

(Whereupon, letter of September 9, 1954, was received in evidence and marked Defendant's Exhibit AK.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I show you a letter dated September 22, 1954, from you to Mr. Church and ask you if you sent that letter to Mr. Church?

A. Yes, sir.

Mr. Rothert: Let me see that one.

Mr. Cullinan: I will offer that letter of September 22nd as our next exhibit in evidence.

(Whereupon, letter of September 22, 1954, was received in evidence and marked Defendant's Exhibit AL.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, at the time Mr. [161] Steiger—you say it was just Mr. Steiger and not Mr. Miller who advised you that Hunt's would no longer sell to you?

A. The first notice we had was from Mr. Steiger, yes, sir.

Q. And at that time you owed Hunt's approximately \$27,000, did you not?

A. Twenty-five, I believe.

Q. About \$25,000? A. Yes, sir.

Q. And some of that indebtedness was for invoices that had been billed to you four months or more before that date?

A. I wouldn't know that.

Q. You don't know that? A. No

Q. After they stopped selling to you during the year 1953, you asked representatives of Hunt's did you not, whether they would consider taking you on a supply bulletin basis? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. You made many requests during 1953 to be considered on a supply bulletin basis, didn't you?

A. Only one, if I remember correctly, in a letter.

Q. Most of your dealings with Hunt's after April, '53, were with respect to how to pay off your indebtedness, weren't they?

The Court: You are getting into an argumentative field, counsel. You have introduced the letters in evidence.

Q. (By Mr. Cullinan): Now, Mr. Phillips, I am referring now [162] to Plaintiff's Exhibit No. 6. You testified that you wrote that letter to Mr. Lee Miller and that you mailed it yourself.

Mr. Rothert: I don't think he could tell which letter it is by the exhibit number.

Mr. Cullinan: Excuse me; March 15, 1953, Plaintiff's Exhibit 6 (showing document to witness). You can hold that. I have a copy of it.

Q. That letter, Mr. Phillips, you testified you typed that yourself.

A. Yes, sir.

Q. And you typed it on a Sunday, did you say?

A. That's what the letter says.

Q. You don't remember whether it was a Sunday or not?

A. It was a Sunday because I came back from a trip, and this is no doubt on a Sunday.

Q. Where did you type this letter?

A. In our office.

Q. In your office. Was anyone else present when you typed it?

A. No.

(Testimony of L. W. Phillips.)

Q. And did you mail it yourself?

A. I mailed the letter at the post office here with other mail. I would do other mail and bring it all in together.

Q. Do you have any independent recollection of having mailed the letter March 15, 1953? [163]

A. You mean an independent recollection of the letter itself?

Q. Yes.

A. All the letters that I would have made up this day are bids that I would send in. I mailed them.

Q. Do you have a specific recollection of having mailed this particular letter?

A. Well, it is four years ago. I would say that I couldn't tell you the minute it was mailed or the hour of the day, but when I come back from a trip I would answer letters and in that bunch of letters was this letter.

Q. You have no specific recollection of mailing this particular letter on March 15, 1953?

A. I would have no specific recollection of that letter itself exactly, but it was mailed that day.

Q. What time of day did you prepare that letter?

A. It would be in the morning.

Q. In the morning?

A. Yes, sir.

Q. Is there something that causes you to remember it was in the morning?

A. I would always go down in the morning before we went to church and make the work up and then go home.

Q. In this letter you state in the opening para-

(Testimony of L. W. Phillips.)

graph that "It has come to me about this matter of Hunt's taking the line [164] away from us and giving it to someone else." How long before this letter had you heard of Hunt's taking the line away from us and giving it to someone else?

A. Probably two weeks before. I think I can give you the exact date from memory.

Q. I hand you Plaintiff's Exhibit No. 7, a letter dated April 15, 1953—dated one month later.

A. Yes, sir.

Q. Let me read the first paragraph of this letter.

Mr. Cullinan: This letter, incidentally, your Honor, is the same as Defendant's Exhibit H. Our H and Plaintiff's 7 are the same.

Q. The first paragraph of the April 15th letter also addressed to Lee Miller says:

"During the past few weeks in covering the different commissaries, word has come to us that Hunt's will be on a supply bulletin in the very near future and that some other concern will be handling the line."

Now, in the March 15th letter the opening paragraph says:

"It has come to me again about this matter of Hunt's taking the line away from us and giving it to someone else."

On April 15th you refer to the "past few weeks" hearing about some other concern handling the [165] line.

(Testimony of L. W. Phillips.)

A. Yes, sir. Do you want me to explain it?

Q. Does that mean that between March 15th and April 15th you had heard the line was going to be taken away from you?

A. I heard of the line being put on a supply basis. We didn't know that on March 15th; we had heard rumors of them going to stop. The supply bulletin was a different matter.

Q. It is your testimony that prior to March 15th you had heard that the Hunt's line was going to be taken away from you? A. That's right.

Q. So, therefore, you went down on a Sunday and wrote this letter to Mr. Lee Miller on March 15th. A. This one, yes.

Q. In between March 15th and April 15th you didn't write any letters to Lee Miller?

A. I have no record of it.

Q. Your next letter is April 15th and that is to Lee Miller?

A. That was the next round, yes, sir.

Q. In that one you refer to hearing that some other concern will be handling the line.

A. The supply bulletin is the matter of the letter.

Q. Did you ever get an answer from Mr. Lee Miller to your letter of March 15, 1953?

A. No, sir.

Q. But in your letter of April 15, 1953, you make no reference to the prior letter or failure to get an answer to that [166] letter. A. That's right.

(Testimony of L. W. Phillips.)

Q. Is there any reason for not mentioning this letter or Miller's failure to answer that letter?

A. Yes, sir.

Q. What was the reason that in the April 15th letter you make no reference to this letter of March 15th and the failure to get an answer to it?

A. I talked to Mr. Miller on the telephone about about ten days after I wrote the letter.

Q. You talked to Mr. Lee Miller about ten days after the letter of March 15th?

A. About that time, yes.

Q. Then why in the April 15th letter do you say that "Word has come to us that Hunt's will be on a supply bulletin and some other concern will be handling the matter"?

A. When I wrote the first letter I didn't know anything about the supply bulletin; I didn't know how they were going to do it, whether they were going to take it away and have another jobber or what was going to happen. We found out the supply bulletin was being made up on that second trip between the two letters.

Q. In your telephone conversation with Mr. Miller after this letter of March 15th, can you tell us what was said in that conversation? [167]

A. Generally the basis of that letter, what's in this letter; I asked him about why didn't he answer it.

Q. Can you tell us what was said?

A. No. I talked for five minutes.

Q. You talked for about five minutes?

(Testimony of L. W. Phillips.)

A. Yes, sir.

Q. In this letter of March 15th you refer in the last paragraph:

“This is a serious matter, Hunt’s promises to us, and I can’t believe myself that Hunt’s would just pull the plug without some reason.”

But the next communication you had was by telephone with Mr. Miller about ten days after that letter? A. I believe that’s right, yes, sir.

Q. You didn’t within the ten days make any effort to get in touch with Mr. Miller?

A. I don’t remember that.

Q. In the April 15th letter you don’t make any reference to how long you expected to have this——

The Court: Counsel, this takes an awful long time for you to ask these questions. I can read these letters. I know what is in these letters.

Mr. Cullinan: All right, your Honor.

The Court: If there is no mention of it, there is no mention in the letter. [168]

Mr. Cullinan: I wanted to ask him why the April 15th letter does not discuss the contract idea as the March 15th letter does.

A. We were trying to get on the supply bulletin; that was the basis of that letter.

The Court: I wouldn’t be interested anyhow in the reasons that any witness gives as to why he did something. It is argumentative, unless there is some factual matter involved. It is a dangerous question to ask any witness why he did so.

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): You wanted to get on the supply bulletin for Hunt's?

A. That is what we thought we would have to do if they was going to take it away from us. We were trying to do that, too.

Q. You were content to—I will withdraw that.

Mr. Phillips, some times you mismailed mail to Hunt's, did you not? Sometimes you did mismail mail to Hunt's? A. Well, I don't know.

Q. Well, let me show you our Exhibit S, for example. On Exhibit S you say:

“I am also attaching a duplicate check for \$750 covering the one we apparently mismailed last week.”

There was a check for \$750 which you mismailed to Hunt's?

A. Either didn't make it or apparently mismailed it. They didn't get it. [169]

Mr. Cullinan: Does your Honor wish to take the noon recess?

The Court: How much more have you got of this?

Mr. Cullinan: Well, I have a good deal more with this witness on other phases.

The Court: We will take a recess until 2:15, then.

(Whereupon, a recess was taken until 2:15 p.m. this date.) [169A]

November 29, 1955, at 2:15 P.M.

L. W. PHILLIPS

resumed the stand.

Cross-Examination
(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, referring to Exhibit Y, which is the letter of March 2nd, 1954, in the last paragraph there there is a statement that "such treatment would make anyone want to pay their bill regardless of the fact that they took the account away from us with a written contract in our hands at the time."

What were you referring to when you referred to the written contract?

A. A written—which I thought was a written contract, an agreement, I should have said, that Mr. Flynn sent to the Army and Navy Purchasing Offices.

Q. You are speaking then of the bulletin which is Exhibit 3? A. That's right, sir.

Q. That is the written contract that you referred to in that letter? A. That's the paper there.

Q. That bulletin represented the arrangements between you and Hunt Foods—the bulletin represented that? A. Except the time element.

Q. Now your letter, Exhibit Y, was March 2nd. Now Exhibit Z, which is Mr. Church's letter, is the one—a letter from [170] Church to you dated March 5th is the one saying that he has been trying to get you on the phone. "Please call me Monday so we can

(Testimony of L. W. Phillips.)

discuss your letter of the 2nd." Then your footnote explains that you tried to reach him by telephone and couldn't do so. That is true: you tried to reach Mr. Church on Saturday at Hunt's?

A. If I said in the letter, I did.

Q. The letter says you will be down either Friday or Monday, February 12th or 15th. This is dated March, so I assume that is a typographical error.

A. That's right; it should have been March.

Q. March 12th or 15th. Did you go down shortly thereafter to see Mr. Church about this letter?

A. If I told him I did, I did. I would have to check my plane tickets.

Q. Let me show you Exhibit 8A, which is your letter to Mr. Church dated April 15, 1954, which starts off, "I didn't get in in time Friday p.m. to see you." Does that refresh your recollection as to whether you got down to see him between March 5th and April 15th?

A. I wouldn't know; I would have to check my plane tickets.

The Court: This is in 1954 you are talking about?

Mr. Cullinan: This is after——

The Court: This is in 1954?

Mr. Cullinan: Yes, your Honor. [171]

The Court: I don't see much materiality to all this.

Mr. Cullinan: The materiality is, if your Honor please, we are going to show by some other letters that when he mentions contract in a letter then he

(Testimony of L. W. Phillips.)

can't reach us to talk about it, when we say, "We want to talk to you about this contract you claim," and he doesn't come down.

The Court: What is the importance of all that? There is nothing that happened afterwards that will make any difference as to what arrangement there was made. It was either made or it wasn't.

Mr. Cullinan: But the conduct of the parties will show whether there was or wasn't a contract.

The Court: Well, there was some arrangement; it is just a question of what the nature of the arrangement was. The conduct of the parties at the time and during the performance of an enterprise is of course very important to determine what the parties meant by their contract, but afterwards it makes no difference. I am never impressed in any case by what the lawyers or even the parties argue about afterwards, because that is after the event, and the only way you can determine what happened is what happened at the time.

Mr. Rothert: Unless there is some admission.

The Court: I don't attach very much importance to this business about whether they had meetings or they didn't have meetings afterwards. It is a lot of data that doesn't seem [172] to me to have any great importance in the matter, except what inferences will follow from the discussions about the amount of money owing, and so forth.

Mr. Cullinan: Let me say——

The Court: I'm just trying to see whether we can't in some way shorten this proceeding. It seems

(Testimony of L. W. Phillips.)

to me to be unduly long, because all that is involved is what is the nature of the arrangement that was made so far as the question of liability is concerned.

Mr. Rothert: Yes.

The Court: What was the nature of the arrangement that was made? That is all. No matter what the parties may have said about it afterwards, unless it is in the nature of an admission against interest, wouldn't make any difference, I wouldn't think, unless you have some particular point in mind.

Mr. Cullinan: I had this point, your Honor: just that he didn't claim a contract until a year after the termination, and even then when he did——

The Court: That isn't exactly what you want to say. What you are trying to say, I think, is that he didn't claim the specific contract that is being sued on.

Mr. Rothert: That's right.

The Court: That is, in any writing, he didn't.

Mr. Cullinan: Yes. [173]

Mr. Rothert: Except his letter of March 15th, 1953, I think that is the date, or April 13th; I forget which one it was.

Q. (By Mr. Cullinan): Let me show you, Mr. Phillips, just to shorten this up, Exhibit AC, a letter of April 27, 1954, wherein you state in the middle of the next to the last paragraph that "we certainly would have never thought of upsetting a profitable business unless past records show and statements made by your sales people that we could have the Hunt line as long as we did a job."

(Testimony of L. W. Phillips.)

Was that the understanding: that you would have it as long as you did a job?

A. The understanding is according to my testimony; and if we didn't do a job, of course, we would have no reason for it anyway.

Q. You don't mention a ten-year basis here?

A. No. May I ask you who I wrote that letter to?

Q. Yes. A. Who did I write it to?

Q. Your letter to Mr. Church dated April 27, 1954.

A. Well, the parties that I talked to were either not with the company or had quit. Church didn't have anything to do with it.

Q. You did have discussions with Mr. Church on occasions after the termination, didn't you? [174]

A. Yes, sir.

Q. Down there at Fullerton? A. Yes, sir.

Q. And in any of those discussions—well, first, in each of those discussions Mr. Church was talking to you about how you were going to liquidate the amount owed to Hunt? A. Yes, sir.

Q. In any of those discussions with Mr. Church did you bring up the subject of any damages that you claimed that you might have against Hunt Foods? A. Yes.

Q. You did bring up the question of the amount of damages or a cause of action for damages against Hunt for termination?

A. I mentioned to Mr. Church the fact that we felt it was wrong and that we had been damaged. I never threatened Mr. Church with a suit.

(Testimony of L. W. Phillips.)

Q. But you did discuss with him while you were discussing the amounts owed to Hunt's, you did discuss with him the fact that you thought had a claim for damages against Hunt Foods?

A. I thought we had been damaged; I never mentioned anything about a legal matter at all.

Q. You thought you had been damaged because of the termination of this arrangement?

A. Yes, sir. [175]

Q. And that was some time shortly after the termination, would you say?

A. It was on most every trip that I saw him, and I made it a practice to go down once every couple of months and go over our account with him and try to pay what we could, and on every occasion I mentioned the fact.

Q. You went down in May of 1953, didn't you, to see Mr. Church?

A. Well, I would have to check my plane fares or the correspondence.

Q. The termination was in the latter part of April?

A. Yes.

Q. Did you go down to see Mr. Church within four weeks after that, would you say?

A. I believe I did. I again would have to check my plane fares that I make out, or the correspondence; I am not able to say now.

The Court: Church was down south?

Mr. Rothert: Yes.

Mr. Cullinan: Mr. Church was at Fullerton, yes.

Q. As a result of these conferences with Mr.

(Testimony of L. W. Phillips.)

Church the establishment of the trade acceptances was worked out? A. Yes, sir.

Q. Going back for just a moment. At the time that the arrangement was worked out initially with Hunt's back in '51, [176] was there any discussion with anyone in Hunt's as to what would happen in the event that you were to die and who would carry on if you were to die? A. No discussion.

Q. Was there any minimum number of purchases that was established; that you would have to purchase any minimum amount of canned goods?

A. None.

Q. You were not required to purchase any particular number of canned goods? A. No, sir.

Q. In February of 1953, you suffered a fire loss, didn't you, in your warehouse?

A. We suffered a fire, yes, sir.

Q. And a good deal of your inventory was burned up in that fire?

A. Yes, sir, but covered by insurance, most of it.

Q. But you didn't recover the whole amount?

A. No.

Q. In insurance? A. No.

Q. In fact, you suffered about a \$10,000 loss in that fire in inventory, didn't you?

A. With the inventory and loss of profits and volume in business—I couldn't estimate; the auditor would have to do [177] that for me.

Q. Can you tell us how much insurance you recovered? A. Approximately \$19,000.

(Testimony of L. W. Phillips.)

Q. What was the name of that insurance company? A. I don't remember that.

Q. This fire loss cut down the efficiency of your doing business, didn't it?

A. Let me——

You are talking about the selling—the operation of selling?

Q. Well, the operation of your business.

A. It would cut down the carrying on of other than selling if we had any, but we didn't have but very little; it wouldn't hurt us any.

Q. It put a crimp in your business, didn't it?

A. I wouldn't say it did. You mean it hurt our business volume or the way we were doing business?

Q. Yes; it prevented you from making profits that you might otherwise make in the business?

A. Well, not as far as Hunt was concerned, because we just kept selling and they delivered.

Q. Well, I am just asking you about your profits in your business in '53. This fire affected the profits in your business, didn't it?

A. Probably some. [178]

Q. As a matter of fact in Exhibits I, J and M you so reported to Hunt's, didn't you?

A. We did what?

Mr. Rothert: I will ask that the witness be shown the exhibits. The exhibits speak for themselves. Exhibits I, J and M?

Mr. Cullinan: Yes.

Mr. Rothert: Can you tell me what dates those are?

Mr. Cullinan: June 1st, '53.

(Testimony of L. W. Phillips.)

Q. In the middle paragraph of that letter you refer to Mr. Liholm's withdrawal of a sum of money.

A. Yes, sir.

Q. "And that coupled with the fire plus the fact that Hunt's suddenly took the account away from us after working at it for a period of two years and letting our other business go down, we found ourselves without a volume to speak of up to a few weeks ago."

So the fire had an effect on your business?

A. No; the volume to speak of in that letter up to a few weeks ago was the business we didn't have when Hunt's quit, I suppose, or something there. The fire of course affected it a little bit but nothing of consequence. We still operated; we still sold merchandise.

Q. I will leave that for a moment.

Now, Mr. Liholm, who is one of the plaintiffs in this [179] action, withdrew \$5,000 of partnership funds in May of 1953?

A. Yes, sir.

Q. And that withdrawal was a surprise to you, wasn't it?

Mr. Rothert: Your Honor, I think this is incompetent, irrelevant and immaterial and beyond the scope of the direct.

The Court: I don't see—

Mr. Cullinan: If your Honor please, he has testified that his business went down in 1953 after the termination. He testified that that was because he no longer had the Hunt account. Now, we want to show that during '53 he had a fire which caused some

(Testimony of L. W. Phillips.)

\$10,000 worth of damage to the business, and Mr. Liholm surreptitiously withdrew \$5,000 from the partnership funds, none of which has been repaid, and in some of the exhibits here he states that that withdrawal of \$5,000 put him in an embarrassing position.

The Court: Assuming that is true, what has that go to do with this case? [180]

Mr. Cullinan: Well, it bears on if he suffered any loss in 1953 after the termination, what was the cause of the loss? Was it because of losing the Hunt account? Because of the fire?

The Court: You mean on the question of damages? Is that what you are speaking of?

Mr. Rothert: I suppose it would relate to that, if anything.

Mr. Cullinan: Yes, that is what it relates to. If there were any damages in 1953 it was because of the termination of the Hunt arrangement.

The Court: I thought you were going to reserve that until the damage testimony was put in.

Mr. Rothert: It is in the letters and I can understand——

Mr. Cullinan: That is right, your Honor. That should come under the head of damages.

The Court: I think probably I made a mistake in not requiring Counsel to finish the direct examination first, because this is becoming quite lengthy. However, we will do the best we can.

Q. (By Mr. Cullinan): Mr. Phillips, in paragraph 5 of your complaint you inform the defendant

(Testimony of L. W. Phillips.)

that you were going to release certain capital funds once you took over the Hunt arrangement. Can you tell us when and who you told that you were going to release this \$10,000 of capital funds? [181]

A. Do I remember who I told?

Q. Yes. A. What did you say?

Q. The complaint, paragraph 5, says at the time you entered into this arrangement with Hunt's, that you informed them that you were going to release certain capital funds from your business, withdraw it. To whom did you say that you were going to release such capital funds?

A. Well, that would be in my original story to Mr. Flynn probably is what that applies to. Capital funds or credit arrangements that we had with Overseas so they could use the money for something else.

Q. You testified that you told Mr. Flynn that you were going to withdraw some capital funds from your business.

A. I probably told Mr. Flynn, of which we have testified to previous to this time, that we probably wouldn't need the capital funds, that we had arrangements to get under this arrangement; if we lowered our business, we would not need the capital.

Q. But you did not tell Mr. Flynn that you were going to release certain capital funds?

A. No specific amount, I don't believe.

Q. What amount of capital funds did you plan to release at that time? Any?

A. We couldn't tell. [182]

(Testimony of L. W. Phillips.)

Q. Did you release any of your capital funds during the time of your arrangement with Hunt's?

A. Yes.

Q. How much?

A. The record shows, I believe, \$12,000 from late 1952 to early 1953.

Q. Your complaint alleges \$10,000. Are you correcting that to \$12,000?

A. The record shows we were probably wrong——

Q. To whom did you release these capital funds?

A. Overseas Finance and Trading.

Q. That is your limited partner?

A. Yes, sir.

Q. Did you give back to Overseas \$10,000 of the capital they placed in the business?

A. We gave them \$10,000 worth of stuff. I don't know how it was applied. We gave them back \$10,000 over a period of six months.

Q. Was that paid for by check?

A. Yes, sir, in small amounts.

Q. A series of checks? A. Yes, sir.

Q. Have you located those checks? A. No.

Q. Isn't it a fact that the \$10,000 or \$12,000 was a loan [183] from you to Overseas?

A. I posted it that way in our books, in our checks.

Q. Your books show that this \$10,000 or \$12,000, whichever it is, was a loan to Overseas?

A. I put in on the check. Each one I paid I would say a loan, and I did that for reasons——

Q. We will get to that in a moment. I just

(Testimony of L. W. Phillips.)

wanted to establish the fact that it is carried on your books as a loan to Overseas.

A. I don't know about being carried on our books. I am only saying what was on the check.

Q. You drew the check?

A. A girl wrote them, I signed them.

Q. Those were delivered to Overseas, your limited partner? A. That is right.

Q. And those checks were marked "Loan"?

A. I believe most of them were, yes.

Q. At the time that you made these loans to Overseas, was the particular amount of money needed in your business to carry out your obligations under the Hunt arrangement?

A. The money that we had—the \$10,000 was the capital anyway. You know really it was in the capital investment stage, and our business was better at the end of 1952 when we started this, and looked pretty good for 1953, that is why I released the money. [184]

Q. I thought you said the money was released starting early in 1952. A. Late 1952.

Q. Late 1952? A. Late 1952.

Q. Late 1952? A. Yes, sir.

Q. And over what period of time did that release of money to Overseas take place?

A. I would have to see the record.

Q. During your time with Hunt's, your other business—you have already testified but I forget what the answer is—was that a brokerage type of business chiefly?

(Testimony of L. W. Phillips.)

A. No, our present business, when we had Hunt's, other than Hunt's was bidding in volume.

Q. Bidding. A. Yes, sir.

Q. In the bidding business do you get commissions?

A. No, we accrue our profits for buying and selling.

Q. Commission earning on brokerage?

A. Yes, sir.

Q. Did your brokerage business increase? Did you add to your brokerage business during the year 1952 when you were on the Hunt arrangement?

A. I would have to look at the books and see. During that [185] year we hired a fellow, I believe, to sell, handle the brokerage end of our business—in other words, do the selling. I wouldn't be able to say it increased or what happened to it. I didn't pay much attention to it.

Q. Isn't it a fact in the year 1952 your brokerage income increased substantially over previous years?

A. The previous year we wouldn't have any. Very little. So anything would have been an increase.

Q. At the time you took on the Hunt account, as I understand your testimony, you planned that you would have to sell some items below cost to you?

A. Depends on how the statement "below cost" is meant. Do you mean below our dollar cost?

Q. Well, below the cost.

A. Of doing business?

(Testimony of L. W. Phillips.)

Q. Below the cost of the goods to you.

A. Well, that is below the cost of his doing business, and in rare instances we sold merchandise a fraction under cost because it may go up from the time I took the order to the time Hunt gave us another price list. It may have advanced a few cents a case. It may show a 30 or 40 cent loss on that item. That was beyond our control. The cost factor we talk about is the cost of doing business, selling.

Q. On occasions you sold below that cost in order to get the goods on the shelves of the commissaries? [186]

A. No, not in order to get the goods on the shelves, of the commissary stores. We would send them a list, and it was possible, we found in looking the invoices over, that the price may go up a fraction, and if it did, we would naturally show that 20 cents a case loss, 5 cents a case loss, or whatever the advance was.

Q. Page 13 of your deposition, lines 2 to 4, where you are testifying about your conversation with Mr. Flynn in September, 1951, this appears:

“I also stated that we would have to also sell merchandise at a lower figure in some instances to get in and keep competition out, and he understood that.”

A. Yes, sir, that is right. The lower figure didn't mention the cost factor. A lower figure means a lower than normally with a profit.

Q. There were times when you sold below cost

(Testimony of L. W. Phillips.)

at these commissaries in order to get the line into the commissary, isn't that so?

A. No, sir, the Hunt Food line was never in that position. It was always under anyone. We never had to go below cost to sell it, no. No, we would not have to go below cost to sell it.

Q. Did you never sell below cost?

A. We sold below cost under the conditions which I explained. [187] We never intentionally sold anything below our cost. If we gave the commissary officer a price today on our trip, and before we got back with the order and got it through the price went up ten cents a case, we might have lost the ten cents a case. That was possible, and I see that we did it in rare instances.

Q. Didn't you have the order from the commissary first before you ordered from Hunt's?

A. No. How is that again?

Q. Didn't you have the commissary order before you ordered from Hunt's?

A. That was the trouble. If I had it the other way, it would have been all right. I took it the other way. I ordered and the price went up.

Q. There would be times when Hunt's price to you would be higher than you had agreed to sell to the commissary?

A. That is right.

Q. You called on these commissaries on the average of about once a month.

The Court: Counsel, I have listened to this patiently now for a long time. I cannot see the relevancy of the manner in which the plaintiff con-

(Testimony of L. W. Phillips.)

ducted the business with the commissaries. It could have been good, bad or indifferent. He could have been a scamp. He may have had associations with the most villainous type of people. It has nothing to do with the [188] case. The only question is what kind of agreement did they have. Apparently from what you presented so far in the case there never was any complaint about the plaintiff's manner of doing business, except that he did not pay for his merchandise as promptly as they thought he should have, but there was never any complaint about the amount of business he did for your clients, and whether he was a good man, indifferent man, or whether you didn't like him, or whether he had a fire or something else, those are matters that do not color my point of view. Lawyers like to lug in a lot of these things. The only question in these cases, if you would get down to them, is what the terms of this agreement were from your point of view, and then the next question is, if whatever agreement there was was breached by the defendant, the amount of damages. I am not venturing any opinion on that subject, but I just do not see any point in whether he sold this merchandise under cost, how many times he called on the commissaries—there are a couple of letters in evidence that indicate he increased the volume and he was doing a good business. He may not have been paying for it. That may be a breach of the contract. But this other stuff—what is the relevancy of it? An awful lot of it is here in the record. Maybe I have not made

(Testimony of L. W. Phillips.)

myself clear, but I do not see the competency of these matters that are being gone into—as much so on the part of the [189] plaintiff as on the part of the defendant. Everybody wants to paint the other fellow as black as the ace of spades. I do not care what color they are. All I want to get is the facts. If you gentlemen will present all the facts that have to do with the contract, if there was one, and the nature of it, we will get along. There was some sort of arrangement between the parties. That is obvious. I am just saying this now to see if we can't—what should have been done in a pretrial conference—get down to the real issue of the case. There was some sort of arrangement between the parties and it went on for some period of time. It must have been governed by some arrangement between the parties, and at a certain time it was terminated by the defendant. Now, maybe there was a right to terminate it, maybe there was not. I do not know. Maybe it was an agreement for a specific period of time, maybe there was no time specified. But certainly there was some arrangement made that was going to continue for some time. It was not to be made today and to end within a few hours, because the defendant himself notified commissaries that the plaintiff was going to conduct these arrangements with them. So maybe it is one of those cases where, if there was no time specified, it was a reasonable time. But there must have been something about the arrangement. That is what I was

(Testimony of L. W. Phillips.)

hoping you would get to, so we could get at it. But so much of this examination, both [190] by the plaintiff and by the defendant, is on immaterial matters.

I think I am correct in what I have said, counsel, that there was some kind of arrangement made, and it existed for some time. It just did not spring out of the ground like Pegasus and have neither a wing nor a body to it. It had something to it. You dispute the fact that it was an agreement and that it was not for a specific length of time. You say, as I understand from your opening statement, it was some agreement terminable at will, but it must have had some period of time to it in order to be terminable at will. What was the understanding of the parties? In order to do justice in this case, that is the issue that I think ought to be gotten at. I am not going to prescribe or proscribe your examination in any way because I do not know as much about this case as you do or as your opponent does. All I am indicating is that there is so much irrelevancy in it so far it is hard for me to keep my mind on the res. I do not want to get off on these side issues.

See if you can get more closely to the issue.

Mr. Cullinan: Of course, your Honor will understand so far as the defendant is concerned, when we deny that there was any conversation or contract such as has been testified to, and you cross-examine the plaintiff, you can't very well establish—— [191]

The Court: I realize that, but you have got off on a line of things with all these letters.

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, in your direct examination you stated that your travel was the main cost of your business, did you?

A. In the Hunt selling, traveling and book-keeping.

Q. And you traveled in connection with your other business as well as for the business done by Hunt's? A. No.

Q. You did not travel for any other business?

A. Very little. Most of that came in the mail or by phone.

Q. There was no brokerage business that required you to travel?

A. I didn't handle that.

Q. I mean it was part of your expense, to travel? A. Yes, that is right.

Mr. Cullinan: No further questions.

Redirect Examination

By Mr. Rothert:

Q. I think on cross-examination, Mr. Phillips, you testified that in one question and answer the invoices stated that you were——

Mr. Cullinan: Excuse me, your Honor. May I have it clarified? Are we going into redirect on a portion of the testimony.

Mr. Rothert: That is what I had in mind. [192]

The Court: I do not know, counsel.

Mr. Rothert: At this point I was intending to

(Testimony of L. W. Phillips.)

have a few questions on redirect on a portion on which he was cross-examined.

The Court: Do you have much?

Mr. Rothert: No.

The Court: All right.

Mr. Rothert: Not many questions.

Q. On cross-examination in response to one of the questions you answered that the invoices were payable in ten days. I will ask you to take a look at the invoice, which happens to be one dated February 10th, 1953, to Wellington Phillips Company on the invoice heading of Hunt Foods, where it says, "Ship to Castle Air Force Base." On the face of that it says: "Contract dated 2/10/53. Terms 2% ten days." The invoices you got on all of this Hunt's business, was there more than one stated terms? Were they all the same or were there various different terms on your invoices?

A. Most of them said 2% ten days, which if we paid it, we got out 2%.

Q. You say most of them. Do you mean 51%, 99%—

Mr. Cullinan: If your Honor please, the witness has not established that he is one who can tell what percentage.

Q. (By Mr. Rothert): To what extent have you examined the invoices of the Wellington Phillips Company received [193] from Hunt Foods between October 1st, 1951, and the present time?

A. That feature I have not looked at very closely, Mr. Rothert.

(Testimony of L. W. Phillips.)

The Court: Is that a printed form or is that typed?

Mr. Rothert: No, that is typed on, that part, the terms.

Q. In answering a question about the assignment of the accounts receivable, you said it proved to be erroneous, and then did you refer to what you later stated, that the first two items on the list of accounts had not been received by you?

A. That is right.

Q. Is that the area you referred to?

A. That is right.

Q. In other respects it was correct?

A. Yes.

Q. There has been some reference to trade acceptances which you signed in 1953. A. 1953.

Q. Was the money owed to Hunt's evidence by those trade acceptances on the same Hunt invoices as were covered in 1952 by the assignment of the accounts receivable? A. No, sir.

Q. I show you Defendants' Exhibit K. This is dated June 17, 1953, and refers to some pumpkin, fancy grade. The last [194] sentence says, "The above worth is about \$9,000." The "above worth," is that referring to the value of the pumpkin?

A. Yes, sir.

Q. Do you mean that is the market?

A. That was the market at the time I wrote that letter.

Q. Defendant's Exhibit T, letter dated October 5th, 1953, has attached to it a photostatic copy of

(Testimony of L. W. Phillips.)

United States Navy Purchasing Office award supply contract. I think you identified that as an open end contract in your cross-examination?

A. Yes, sir.

Q. Was that order filled or consummated?

A. Completely? In full?

Q. Either completely or to some extent.

A. In part.

Q. What is an open end contract?

A. It means they can draw if they wish, and if they don't wish they don't have to. It is drawn by the ships and shore. It is made for a three months period for the Navy to draw at their discretion.

Q. You commit yourself to deliver?

A. Yes, sir.

Q. And they withdrew—

A. If they want to. You are supposed to know how much they want, though. [195]

Q. Do you know how much the Navy drew on that particular open end contract?

A. I wouldn't be able to say. 25,000 pounds—\$25,000 worth, I think.

Q. This appears to have a total of 105,175, it states.

A. \$25,000 is what they drew, as a round figure.

Q. On Defendant's Exhibit AK is a hand-written P.S.: "We have \$86,000 worth of turkey orders to the commissary stores for delivery before November 16th. This should help us clean you up pretty well before your November closing." The letter is dated September 8th, 1954. What kind of

(Testimony of L. W. Phillips.)

an order for those turkeys was that particular order that is referred to in your note?

A. That was both open end and firm orders. Some we filled, some we could not, due to credit.

Q. To what extent did you fill the orders which this note purports to be in the amount of \$80,000?

Mr. Cullinan: Just a minute.

The Court: I do not see the relevancy of this. What has this got to do with the case? Of course, the letter is in evidence. You put it in. But what is the importance whether or not some account that he referred to that might be a means of paying an acceptance, what has that got to do with the case?

Mr. Rothert: As your Honor indicated, of course, the letter is in evidence, and I thought two or three points in the letter might require explanation.

The Court: I do not mean to be facetious about it. The explanation might be interesting, but I do not know why it is material.

Mr. Rothert: I assume the letter is introduced for possible admissions by Mr. Phillips that his business was really booming during that period after the termination of the Hunt account.

The Court: That would hardly follow from the long list of letters in which there is a constant request for payment and explanations made as to how soon payment could be made, and so forth. There is a long list of that, which I assume counsel has offered for the purpose of pointing up his argument or statement that it was inconsistent with the idea that Phillips had a claim against the Hunt people

(Testimony of L. W. Phillips.)

for breach of the agreement, but the details of that I see no reason for going into.

Q. (By Mr. Rothert): You were asked if you ever got a letter in reply to your letter of March 15th, 1953, to Mr. Miller, which is Plaintiffs' Exhibit 6, and you said no. Did you get a reply to your letter of April 15th, 1953, to Mr. Miller?

A. No, sir.

Q. Do you recall ever getting a reply to any letter that [197] you wrote to Mr. Miller's attention?

A. No, sir.

Q. You said that after the March 15th, 1953, letter, Plaintiffs' Exhibit 6, which is the first of the two letters that you referred to rumors that you heard that you were going to lose the Hunt account, you said that you wrote the letter, and then I think you said about ten days later talked to Mr. Miller on the phone?

A. Yes, sir.

Q. And when you were asked what the conversation was, you said you could not say what was said. Do you have any recollection at all of anything that was said in that phone conversation?

A. We talked for five minutes. We talked about this matter of cutting off——

Q. I didn't ask you how long you talked. Do you remember anything you said or anything Mr. Miller said?

A. I asked Mr. Miller what the trouble was and why we were being taken, what was happening, or why we were not notified or given some information on it to tell us the reason why. He said it was out of his hands. That was the gist of the conversation.

(Testimony of L. W. Phillips.)

I don't remember anything else that was said. About that time I was pretty excited about it.

Q. Did you continue to sell Hunt's merchandise after that? A. Yes, sir. [198]

Q. Do you recall anything else that was said in that conversation on the telephone?

A. I asked Mr. Miller what he knew about it. He said he didn't know anything. It was out of his hands.

The Court: He has already covered that. It is getting repetitious now.

Mr. Rothert: I didn't know just what he meant by out of his hands, and I didn't want to lead him into anything, your Honor.

I have no further questions.

The Court: Will you continue to complete the examination of the plaintiff, whatever you have to ask on damages or any other phase of the matter, so we can get through with his testimony at some time or other.

Q. (By Mr. Rothert): Mr. Phillips, where did you put the Alameda Air Force Bases?

A. They are under the rubber band.

The Court: Suppose you get your material organized. We will take a five-minute recess.

(Recess.) [199]

Mr. Cullinan: If your Honor please, before we get into the question of damages, not to upset the decorum, I have a witness who has to leave for

Phoenix tomorrow. He will be a very short witness, less than five minutes, if we could just put him on out of order.

The Court: Certainly.

Mr. Rothert: I have no objection.

W. J. REID

called as a witness on behalf of defendant, out of order; sworn.

The Clerk: Please state your name to the Court.

The Witness: W. J. Reid.

The Clerk: Please spell you last name?

The Witness: R-e-i-d.

Direct Examination

By Mr. Cullinan:

Q. Mr. Reid, in 1951, were you employed by Hunt's Foods at Fullerton, California?

A. Yes, sir.

Q. You are no longer with the company?

A. No, sir.

Q. And in 1951, you were the export and government supply manager of Hunt Foods?

A. Yes, sir.

Q. In August of 1951, did Mr. Phillips come to see you?

A. I am not positive of the date, but I believe so, yes. [200]

Q. Had you asked him to come or had he asked to see you? A. He asked to see me.

Q. What was the purpose of the meeting?

Mr. Rothert: I will object to that on the ground

(Testimony of W. J. Reid.)

that calls for a conclusion and opinion of the witness.

The Court: Yes.

Q. (By Mr. Cullinan): What was said at the meeting between you and Mr. Phillips? First, was anyone else present?

A. I am not sure whether or not Mr. Miller was present or not. Usually Mr. Miller was asked to join any conversations that Mr. Phillips and I had whenever Mr. Phillips visited Fullerton.

Q. Coming back to this date, what was said at this meeting? A. In general?

Q. Yes.

A. Well, in general, it was Mr. Phillips' intention to obtain an agreement or an arrangement to represent us in the military trade in Northern California.

Q. As a broker or jobber or in what capacity?

Mr. Rothert: You are still limiting it to what was said? Your question refers to what was said?

Q. (By Mr. Cullinan): What said said, as near as you can remember, at that meeting?

A. Well, his intention, as I said before, was to obtain an agreement from Hunt for him to proceed in representing Hunt [201] to the military commissaries and other agreeable military outlets in Northern California.

Q. What did he say? Do you remember what he said and what you said at that meeting?

A. Well, specifically I can't tell you the exact conversation; but in general, his intentions were

(Testimony of W. J. Reid.)

voiced and we tried to arrive at an agreement for him to proceed.

Q. Anything said at that conversation about any period of time that he might be considered as a representative of some sort of Hunt's?

A. You mean the duration of the agreement?

Q. Yes.

A. I believe not. In fact, I am sure not.

Q. Did he ask you in that conversation for any ten year contract? A. No.

Q. Did Hunt Foods at that time enter into ten year contracts?

Mr. Rothert: I will object on the ground it is calling for the conclusion and opinion of the witness.

The Court: Yes. Sustained.

Q. (By Mr. Cullinan): Was anything else said at that meeting that you remember?

A. Well, the final agreement, as I recall it, was arranged that Mr. Phillips would act as a jobber rather than a representative, and under such arrangement he would buy merchandise [202] from Hunt Foods and resell to the commissaries.

Q. In your conversations with him there was no discussion about a length of time that he would so act?

Mr. Rothert: That has been asked and answered and it is a leading question.

The Court: Yes, he has already said there was no duration discussed.

Mr. Cullinan: That is all.

(Testimony of W. J. Reid.)

Cross-Examination

By Mr. Rothert:

Q. Mr. Reid, where were you when this conversation took place? A. In Fullerton.

Q. I mean in whose office? A. In my office.

Q. Your title then was manager of the export and government supply department?

A. Yes, sir.

Q. Did your duties include all sales to government purchasers or just overseas export government sales?

A. Well, there was a distinction between my responsibilities excluding the commissary stores, but in general, I had a voice of opinion in all forms of government business.

Q. Was Mr. Flynn, the district manager at Hayward, California, under your jurisdiction in the chain of command in the company? [203]

A. No, sir.

Q. He was under Mr. Miller, was he?

A. Yes.

Q. Was Mr. Miller the sales manager for all district sales of Hunt Foods? A. Yes, sir.

Q. District sales are districts in the United States but not export or overseas; is that true?

A. We had a district in Hawaii which could be considered overseas.

Q. Was that district under Mr. Miller?

A. No, it was under mine.

Q. Under yours. Did you just have one conver-

(Testimony of W. J. Reid.)

sation with Mr. Phillips that you can remember in 1951? A. No, I believe we had several.

Q. Didn't Mr. Phillips in the later summer of 1951 contact you and ask you if his company could handle Hunt's sales to overseas governmental military installations? A. Yes, he did.

Q. Was that discussed in the same meeting you are referring to in your direct testimony?

A. I believe so, yes, if I am thinking of the same meeting.

Q. Well, was that matter of sales to overseas military purchasers the subject of discussion in other meetings than the one you referred to on direct testimony? [204]

A. Yes, sir, I believe so.

Q. No arrangement was ever made with Mr. Phillips about sales overseas?

A. None that I know of.

Q. I think you said you are not sure whether Mr. Miller was present or not.

A. Mr. Miller was present in some of the discussions and in others I remember he was not available.

Q. You were asked on direct examination whether there was a meeting in August of 1951; you said you weren't too sure it was August, but you remembered a meeting.

A. I remember several meetings. [205]

Q. This testimony you gave on direct examination, where those statements made in several meetings or in just one meeting?

(Testimony of W. J. Reid.)

A. Well, the agreement was the culmination of several meetings.

Q. When you say the agreement, you are speaking of the culmination of a series of discussions?

A. Yes, sir.

Q. When was the last of the series of discussions?

A. As best I can recall, it was in the summer of '51.

Q. Will you give us your best estimate as to what time, June, July, August, September, October, November or December?

A. I am not sure. The month of August was mentioned in this so I presume that there is some bearing.

Q. If the month of August had not been mentioned to you here in court today, what would you have said was the time of that meeting?

A. I couldn't swear to what time.

Q. Did you know Mr. Phillips before; that is, prior to the summer of 1951?

A. I believe I did, yes. I knew him before he started calling on us in Fullerton.

Q. Did you at one time introduce him to Mr. Miller?

A. Yes, sir.

Q. When you introduced him to Mr. Miller did he tell you that he wanted to talk to Mr. Miller about some Hunt business? [206]

A. I am not positive of this, but I believe that I suggested that Mr. Miller be in on the conversations because it was business conducted within one

(Testimony of W. J. Reid.)

of his districts and therefore it was his responsibility, so I introduced him.

Q. I think you mentioned that military sales in Northern California was one of the phases discussed in this conversation. A. Yes, sir.

Q. Did you know that the Hunt Company salesmen had been handling sales to the military bases in Northern California at that time?

A. Yes, sir.

Q. Was there any mention in this particular conversation, these conversations you referred to, as to what price basis the Hunt products would be sold to Mr. Phillips?

A. The price sold to Mr. Phillips for the military?

Q. Yes.

A. I don't remember any specific conversations on that subject, no, other than the price prevailing at that time.

Q. You mean the prevailing jobber prices?

A. Yes, sir.

Q. Were you familiar with the prices at which Hunt salesmen were then selling the products to the military bases?

A. Familiar to the extent that I received copies of all price lists issued. [207]

Q. Was there any mention in these conversations that you say you sat in on that Mr. Phillips had discussed these matters with Mr. Flynn in Hayward?

A. Yes, I did recall that he mentioned that he

(Testimony of W. J. Reid.)

had discussed it with Mr. Flynn in Hayward and that Mr. Flynn had sent him to Fullerton to discuss it with me, and in turn I referred him to Mr. Miller but still stayed in on the conversations.

The Court: Why would Mr. Flynn have sent him to see if you had charge of the overseas division? I don't quite understand that.

A. Well, the subject of representing Hunt at that time included more of the domestic sales to the commissaries which had previously been solicited by Mr. Flynn's salesmen, and also included the subject of overseas business, which was strictly under my control.

Q. Wouldn't it have been more reasonable that he would have sent him to see Mr. Miller, who was the head of the domestic business?

A. I am not so sure of that, your Honor. It was known within the company and within the key personnel that I was in charge of the Government business, and as long as the overseas business was a part of the conversation, Mr. Flynn sent him to see me.

Q. Did you have charge of the Government business within [208] this particular district?

A. Certain types of military business I handled domestically as well as overseas.

Q. You mean this buying and selling to commissaries, was that——

A. Not particularly the commissaries; subsistence purchases.

Q. That was within Mr. Miller's jurisdiction?

A. Yes, sir.

(Testimony of W. J. Reid.)

Q. In this discussion with respect to Mr. Phillips undertaking to act as a jobber in dealing with the commissaries was really a matter that Mr. Miller would be more apt to be interested in?

A. Yes, sir. That was the reason I introduced them and expedited the meeting.

Q. Mr. Phillips has said on the witness stand that he went down there to see Mr. Miller because Flynn told him to go down and see Miller. Did Phillips tell you that Flynn had sent him down to see you?

A. That was my understanding, yes, sir.

Q. That was your understanding?

A. Yes.

The Court: All right; go ahead.

Q. (By Mr. Rothert): I will ask you if when Mr. Phillips came in to see you he didn't tell you that he wanted to talk to Mr. Miller and asked you to introduce him to Mr. Miller? [209]

A. As near as I can recall, that is my recollection. Mr. Phillips and I knew each other, and he came in to see me, and the conversation was started, and as soon as I understood the text of his intentions, I——

The Court: That isn't exactly what he asked you. He wanted to know whether it was your recollection that Mr. Phillips had asked you to take him in and introduce him to Mr. Miller. He wants to know whether that was so.

A. I wouldn't care to testify to that, your Honor.

(Testimony of W. J. Reid.)

Mr. Rothert: To make it more complete——

The Court: What?

A. I wouldn't care to testify to that because I am not positive.

Q. You don't recall? A. No, sir.

Q. (By Mr. Rothert): I show you a copy of a letter dated October 2, 1953, a photostatic copy of an original, and ask you if you can recall receiving that letter from Mr. Phillips?

The Court: What was the date of that letter?

Mr. Rothert: October 2nd; I said '53; I meant '51, your Honor. I misled you.

The Court: That letter has not been marked in evidence?

Mr. Rothert: Pardon me?

The Court: That letter has not been marked in evidence?

Mr. Rothert: I don't believe it has, your Honor. [210]

The Court: It was referred to by the defendant but not marked in evidence.

A. Yes, sir, I think I do remember this letter.

Mr. Rothert: May I offer it as Plaintiff's Exhibit next in order and have it marked?

(Whereupon, photostatic copy of letter referred to above was marked Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Rothert): Now, Mr. Reed, I will ask some questions about the letter but I want to clear up another point first. You say that in your

(Testimony of W. J. Reid.)

capacity at that time there was certain government business in Northern California that came under your jurisdiction? A. Yes, sir.

Q. Wouldn't that be the government business that was purchased primarily for use overseas or at overseas bases or on ships that would be leaving the country?

A. The end use might turn out that way. However, the business that I was referring to in Northern California was subsistence purchases made by the Oakland Quartermaster, Navy Purchasing Office, and Army and Air Force Exchange Service.

Q. On the so-called bidding basis where people bid to the government to sell subsistence foods and other items for troop use? [211]

A. Yes, sir.

Q. That type of business was not at that time under Mr. Flynn's authority or supervision as district sales manager, was it?

A. No, sir. In addition to the subsistence, overseas resale business was under my jurisdiction.

Q. The sales to the commissary stores located on the Army, Navy and other military bases in Northern California would be regular sales under Mr. Flynn's jurisdiction? A. Yes, sir.

Q. And under Mr. Miller's higher authority and supervision and not under yours?

A. Although I repeat what I tried to explain earlier; my opinion was usually asked in any instances of change. Now, I might explain that Hunt

(Testimony of W. J. Reid.)

Foods was a rather young company at that time insofar as their management and departments, and overlapping of responsibilities was sometimes present. Therefore, my opinion was asked on commissary business.

Q. You mean, don't you, that your opinion was often asked but there wasn't any doubt about where your jurisdiction started and ended?

The Court: That is a little bit on the argumentative side.

Mr. Rothert: I think it is, your Honor.

Q. Now, this letter I have shown you of October 2, 1951, [212] isn't it true that the matters referred to in that letter had to do with the government business under your jurisdiction, namely, sales for subsistence use or for resale in overseas use by the military?

A. Yes, sir.

Q. And weren't there times when Mr. Phillips talked to you alone when neither Mr. Miller nor anyone else from the Hunt Foods Company was present and talked to you about arrangements with Hunt Foods for that type of sales that came under your jurisdiction, as a broker?

A. Yes, he did talk to me on that basis.

Q. And on this occasion that you say you remember introducing him to Mr. Miller and Mr. Miller was in on part of the conversation, in that very same occasion Mr. Phillips talked to you about this overseas subsistence government business, too, didn't he?

(Testimony of W. J. Reid.)

A. On the day that I introduced him to Mr. Miller?

Q. Yes.

A. I couldn't recall positively, but I would imagine so.

Q. My recollection is that you said that when it appeared to you that what Mr. Phillips was talking about would involve Mr. Miller's scope of authority, then you thought Mr. Miller ought to get in on it?

A. Yes, sir. That was referring to the commissary business.

Q. Yes. On that particular conversation did Mr. Miller [213] remain in your office and talk to Mr. Phillips or did they leave your office at some time together, that is, did the two of them leave and leave you?

A. I don't believe they did leave.

Q. No arrangement was made with Mr. Phillips with respect to the overseas or subsistence type of government sales?

A. No, sir.

Q. What business are you in now, Mr. Reed?

A. I am with Granny Goose Foods.

Q. Now, in any of these conversations that you had at which you were present with Mr. Phillips, do you recall anything being said by Mr. Phillips that if he took on the sales to the commissary stores in Northern California it would be an unprofitable matter for him for a period of time because prices on the Hunt products were already established with the commissary bases and it would be some time

(Testimony of W. J. Reid.)

before he could create a margin of profit for himself.

Mr. Cullinan: Would you repeat that question? I didn't get it.

The Court: Read it.

(Question read.) [214]

A. I am not sure on that. I believe he might have mentioned something like that, which would be quite normal.

Q. (By Mr. Rothert): You say it would be quite normal. You knew that the Hunt prices at which the products had been sold by the salesmen were substantially the same prices that Hunt was going to sell the products to Mr. Phillips?

A. I didn't mean it in that sense.

Q. Didn't you know that at the time of the discussions?

Mr. Cullinan: He is answering the question.

The Witness: I didn't mean it in that sense. I meant it in a sense whenever anybody starts with a new venture, it is usually unprofitable at the beginning until you get established.

Mr. Rothert: You knew that. Didn't you also know that because of the fact that the price that Mr. Phillips would have to pay for the Hunt products was practically the same as the prices which the commissary bases had been paying for the products, that he could not make a profit until he could increase the price to the commissary stores and create a margin of profit?

(Testimony of W. J. Reid.)

The Court: That is obvious. I do not know why we waste time on that. Of course that is so. I do not have to be convinced about that. The man is going to buy the product of the Hunt Company. He can't make any profit on it unless he can sell it for more than he paid Hunt for it. It doesn't [215] take a Philadelphia lawyer to see that. All that does is to get us into argumentative matters. If you want to ask him what was said in the conversation——

Mr. Rothert: That is what I say. I am more interested in whether he recalls that being discussed. I think I asked him that and he said he thinks something along that line was said.

Q. Do you recall any comments by Mr. Phillips as to the business he was then engaged in, namely the bidding business for military subsistence, purchases?

A. I am not sure that he mentioned it at that time because probably that was assumed, because I knew of his type of business and his specific business before he ever came to Fullerton. I knew that that was a part of his business.

Q. Do you recall any comments being made in those conversations that Mr. Phillips' bidding business was profitable that year? He was making money on it?

A. I don't recall that, no.

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,

Appellant,

vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,

Appellees.

Transcript of Record
In Two Volumes

Volume II
(Pages 267 to 542)

Appeal from the United States District Court for the
Northern District of California,
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FILED

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(Testimony of W. J. Reid.)

Q. Do you recall any statements by Mr. Phillips that because he could not make money on the sales to the commissary for a period of a year or two he would have to have it for a period of time longer than two years, otherwise he didn't want to take it?

A. No, sir, I do not recall that.

Q. Do you recall any statements by Mr. Phillips that in [216] order to handle sales to the commissary stores he would have to give up most of his bidding business because he would have to handle it himself?

A. You are refreshing my memory a little bit now on the bidding business. I believe the conversation was to the effect that the bidding business was less frequent than Mr. Phillips had enjoyed in the past, and that he needed additional lines or additional outlets for his type of military business.

Q. For what type of military business?

A. Well, military business.

Q. Did you ever see a memorandum, an inter-office Hunt Foods Company memorandum issued by Mr. Flynn stating that Mr. Phillips was starting to make the sales to commissary stores in Northern California?

A. To whom was the memorandum addressed?

Mr. Cullinan: If your Honor please, I think we are getting beyond the scope of the direct examination.

The Court: I am inclined to think so. That is already in evidence, anyhow.

(Testimony of W. J. Reid.)

Mr. Cullinan: I do not know that it is.

The Court: Yes, it is attached to the memorandum that was sent to all the commissaries. There is a memorandum that went out with it directed to all the salesmen, that called their attention to the fact that this memorandum [217] was being sent out to the commissaries, and that they would get the credit for any sales on their accounts. I mean, if that is what you are referring to as an inter-office memorandum——

Mr. Rothert: Mr. Miller in his deposition said that he saw an inter-office memorandum, and I asked Counsel if he could produce it for me.

The Court: You are talking about something different.

Mr. Rothert: I do not know whether it is the same thing or not myself.

The Court: The direct examination was merely confined to this meeting with Mr. Phillips.

Q. (By Mr. Rothert): How many times can you remember you talked to Mr. Phillips in Fullerton in which the subject of sales to the commissary stores in Northern California was discussed?

A. A half dozen.

Q. On the last one of those, which you said was the culmination——

A. I didn't say—it wouldn't be the last one. He discussed the subject with me before and after.

Q. I see. Well, there was one meeting which you said was a combination, and in your words, came to an agreement. How many can you remember up to and including that one?

(Testimony of W. J. Reid.)

A. Three or four. [218]

Q. After that there were some other discussions?

A. Yes, sir.

Q. About the same subject?

A. Yes, sir, same general subject.

Q. Was Mr. Miller present at all of them?

A. No, sir, I wouldn't say that.

The Court: It is not clear to me what you are talking about now. You say there was a meeting at which there was an agreement. I do not know what that means. You leave it up in the air, both sides. Maybe you want to leave it up in the air. I don't know. It is not clear to me. The testimony doesn't mean anything, unless you state what the conversation is that occurred.

The Witness: Are you asking me the question?

The Court: Yes. State what conversation you had on the subject of what arrangements were to be made with Phillips.

The Witness: I thought I made it clear——

The Court: No, you said what it did not contain, that it did not have any duration period to it. Other than that, I do not know what the conversation was.

The Witness: As near as I can recall, it was agreed that Mr. Phillips would be a jobber selling to the commissaries.

The Court: That is all there was?

The Witness: Yes, sir, he would not act as a broker or a [219] representative, it is sometimes called.

(Testimony of W. J. Reid.)

The Court: Then the sum and substance of it is he made these visits down there to you gentlemen and what was finally agreed to was he was to be a jobber selling to the commissaries for Hunt Brothers during that period, is that it? A. Yes.

Q. No other terms or conditions? A. No.

Q. (By Mr. Rothert): Was there anything said about you going back and talking to Mr. Flynn about it? A. I beg your pardon?

Q. In this particular meeting where you say it was agreed that Mr. Phillips would be a jobber, did either you or Mr. Miller tell him to go back and discuss it further with Mr. Flynn?

A. I don't believe so.

The Court: This is a sort of mountain that labored and gave forth a mouse. He went down and had all these discussions with you and all that finally was said was, "Yes, Mr. Phillips, you are going to be the jobber that is going to handle the commissary business"? That is all that came forth?

The Witness: To clarify your thinking, sir, Mr. Phillips' first intention was to act as our broker or representative, to which we did not agree. The final agreement was to make him [220] a jobber.

The Court: Were there any details of this discussed and related to you up here locally with the sales manager here? The details of how it was going to be handled? A. No, sir.

Q. In other words, you were agreeing down there on the general policy?

A. That is right.

(Testimony of W. J. Reid.)

Q. The general policy that Phillips was to be the exclusive jobber and representative of Hunt in connection with sales to the commissary?

A. Yes, sir.

Q. Once that general policy was agreed to, that is as far as you went? A. Yes.

Q. (By Mr. Rothert): The general policy meant that he would not be a broker but would be a jobber? A. Yes.

Mr. Rothert: I have no further question.

Mr. Cullinan: No further question.

The Court: That is all, sir.

L. W. PHILLIPS

resumed the stand; previously sworn.

Direct Examination

(Continued)

By Mr. Rothert:

Q. Mr. Phillips, how many commissaries [221] were there in Northern California during the period of time that you were selling the Hunt line at the commissaries?

The Court: I think he has already testified—19.

A. Yes, sir.

Q. (By Mr. Rothert): Alameda Naval Air Force Base was one of those? A. Yes, sir.

Q. Have you reviewed all of the invoices from Hunt Foods to you for delivery to Alameda Air Force Base, sir, in all the purchase orders from that commissary to you during the period you were selling the Hunt line?

(Testimony of L. W. Phillips.)

A. For twelve months, yes, sir.

Q. At the time you started in December, 1951, were any of Hunt's items being sold at that commissary?

A. We had no record of it.

Q. Did you see any Hunt's items for sale on the shelves?

A. No.

Q. You just said you had no record of it. That is not answering whether or not they sold any.

Mr. Cullinan: I will object, your Honor. It has not been established whether this man knows one way or the other.

Q. (By Mr. Rothert): Did you visit the Air Force commissary stores?

A. Yes. [222]

Q. When did you first call over there after starting out on December 1st, 1951?

A. In the middle of December.

Q. When did you make your first sales to the Alameda commissary?

A. I believe April, 1952.

Q. At the end of the period how many items had you sold to the Alameda commissary?

A. Items and sizes, 55. Don't be confused—items and sizes.

Q. Like if peas are in two different sized cans, that would be two?

A. Yes.

Q. What total amount of sales did you make to that commissary store during that period?

Mr. Cullinan: If your Honor please, I will object to this as incompetent, irrelevant and immaterial as to what volume of sales he had in a particu-

(Testimony of L. W. Phillips.)

lar twelve months' period to one of the commissaries. It won't tell us anything.

The Court: I don't know what the purpose of this is. Will you state your purpose?

Mr. Rothert: Your Honor, he did a certain amount of business. If I can't prove what business he did——

The Court: I am not stopping you from proving it. I just want to find out what is the theory upon which you are proceeding. Counsel is making an objection on the [223] materiality.

Mr. Rothert: I will explain the theory on that. We have selected the Alameda Air Force commissary base as an example. That is, we intend to prove that in the period that he worked on it he sold a certain amount, he made a certain amount of gross profit, he increased the number of items that the commissary would take and sell to a certain number, that there was a certain volume, that the volume averaged so many cases per item and to show the experience that one commissary store had.

Then I intend to prove the progress he made at other commissary stores and the acceptance of the Hunt line at other commissary stores, the figures as to dollar amounts and the gross profit that the Alameda Air Base commissary can be used as a guide, some basis for estimating his prospects if he had been allowed to continue with the Hunt line. I had hoped—I shouldn't say I hoped—I had asked him to make the same computation for another base. It would be a huge job to take all 19 of them, just to

(Testimony of L. W. Phillips.)

have a little more basis than one. Maybe he should do that tonight and come in to carry on tomorrow with another base.

The Court: I will overrule the objection. I realize you have to start some place in this process of trying to prove your allegations as to damage.

Mr. Rothert: We admit we did not make any profits at [224] the time of the termination, but that does not necessarily preclude us or does not mean we would never have made any profits at any time later on.

Mr. Cullinan: If your Honor please, the thing that is already testified on direct examination is that the commissary purchases by brand at the discretion of the supply officer. Maybe a supply officer at the Naval Supply Depot in this particular period was a particular officer who was a friend, who would buy a certain amount of goods, but that would not establish anything for any other base or for any other period of time.

Mr. Rothert: The California law, as I understand it, does not preclude the showing of prospective profits.

The Court: If there is some evidence that a certain volume of business is built up, there might be inferences that could be drawn from it. I think your objection really goes to the weight of the testimony rather than to its admissibility. Maybe when he gets all through it won't have any weight, but I think there is no just basis for excluding the opportunity to present whatever the plaintiff has in

(Testimony of L. W. Phillips.)

the matter in that regard, whatever showing he needs to make. I think the objection really goes to the weight rather than to the admissibility of the testimony. I will overrule the objection.

Mr. Rothert: It may be of assistance to the Court. I [225] have a California Supreme Court decision, which is a very short statement on this question of prospective profits. Your Honor's statement is practically one hundred per cent correct.

The Court: Let us wait until we get the evidence. I will overrule the objection.

Q. (By Mr. Rothert): What was the total amount of sales to the commissary at the Alameda Air Base?

A. For this twelve months' period that we recapped, \$10,805.52.

Q. Did you check the invoices of Hunt's on which you paid for that very same merchandise sold to Alameda? How much was the invoice price——

Mr. Cullinan: If your Honor please, I want to get this clear before we get into it. If the man has invoices present, I do not want to clutter up the record with all these invoices, but I would like permission to take them with me this evening to check them over after he has testified to a summary of the invoices.

The Court: You can arrange to examine the details. Go ahead.

Q. (By Mr. Rothert): What was the cost of

(Testimony of L. W. Phillips.)

the Hunt Products that you sold to Alameda commissary for the \$10,500 and some figure?

A. \$10,805—the cost was \$10,050, a difference of \$755. [226]

Q. You said this twelve month period.

A. From April to April.

Q. There was not any other period in which you sold to Alameda Air Force Base, was there?

A. No.

Q. Now, you have a record of the volume of each item that you sold?

A. That is right; as a breakdown of each individual item—the 55.

Q. I am not going to ask you for each of the 55. What was the largest volume item?

A. 46-ounce tomato juice.

Q. How many of those were sold in the twelve months? A. This shows 249.

Q. 249 what? A. Cases.

Q. That is an average of about 20 a month?

A. That is 20 per month, yes, sir.

Q. What was the lowest item in volume?

A. Eight-ounce spinach—300 spinach—one size of spinach.

Q. Spinach in size 300 cans? A. Yes, sir.

Q. What was the volume on that?

A. Three.

Q. For the whole year? [227]

A. Yes, sir.

Q. What was the total number of cases that you

(Testimony of L. W. Phillips.)

sold of all items and all sizes for that total amount?
Have you got it added up?

A. Awfully quick. 2,148, approximately. I may have missed it a case or two, but 2,148.

Q. What percentage of profits did you make in the later sales as compared to the early sales?

A. Our early sales——

Mr. Cullinan: Just a minute. If your Honor please, I think there ought to be some foundation laid as to how he arrives at this percentage which is early sales and later sales.

The Court: You will have to lay a foundation. What do you mean by “early”?

The Witness: The first three months vs. the last three months.

Q. (By Mr. Rothert): What was the percentage of gross profit for the entire year’s business at that one commissary? A. Seven and a half.

Q. In the sales in April of 1952, have you computed or do you have any record there of what profit or percentage of profits you made?

A. Five—approximately five per cent.

Mr. Cullinan: Can we establish the foundation of how [228] he computed this percentage? What were the factors to compute five per cent? What figures and factors did you use?

The Witness: Well, we used the cost—our purchase order cost, and then Hunt’s cost to us, and the difference on the selling price.

Q. Do you have five per cent written down somewhere?

(Testimony of L. W. Phillips.)

A. No, but I am fast enough on figures. There is a five average, and then it gradually increases as it goes along.

Q. You have here a list of each sale and each purchase from Hunt Foods? A. Yes, sir.

Q. One opposite the other? A. Yes, sir.

Q. The column entitled C, that is costs?

A. Yes.

Q. The column headed S is sales?

A. Yes.

Q. And are these down in chronological order?

A. Yes, sir, by dates.

Q. What is the third column, P.O.?

A. Purchase order numbers, so they can be identified.

Q. I will put that with the invoices themselves. Did you review the invoices for any other commissary store? A. Fort Ord.

Q. Fort Ord? [229] A. Yes, sir.

Q. Do you have the same amount of review of computation for Fort Ord?

A. Not profit-wise, just cost-wise.

Q. What total items did you sell at Fort Ord?

Mr. Cullinan: If your Honor please, it will be understood that my objection that this is incompetent, irrelevant and immaterial goes to the Fort Ord business, too.

The Court: Overruled.

A. Fort Ord, on the invoices which I checked, which was four, to give us a pattern, because we

(Testimony of L. W. Phillips.)

picked what we call a heavy item and a little item to do that—you couldn't pick all big ones——

Mr. Cullinan: Just a minute, if your Honor please. I object to this. If he developed some theory of his own as to how he picked the pattern, I am in no position to tell what this pattern is.

The Court: You had better lay a foundation as to how this was done.

Q. (By Mr. Rothert): Did you review all of the Fort Ord invoices?

A. I reviewed four months of Fort Ord—five months.

Q. When did you start selling at Fort Ord?

A. Immediately when we took it over. We were always selling them some stuff. [230]

Q. What five months did you take?

A. It looks like the last three of 1953—the first three of 1953 and the last two of 1952.

Q. That is five months?

A. Yes, the last few months we had it and the month or two previous to that. [231]

The Court: I think you had better prepare this, Mr. Rothert. I do not feel that it is proper to take up the Court's time in doing this calculation here. You ought to have some schedules, exhibits prepared to show the manner in which you are calculating your complaint for damages so that they are ready to be presented to the Court and explained, but I can't see giving the time to having the witness thumb through papers and look at items that he has made notes on and give testimony on it. It is

not in a shape that the Court can follow it. I have tried cases and participated in cases involving different subjects. You will have to have some data that is already prepared so it is in exhibit form, in some intelligent form so that the trier of the fact can follow it and see how the claim is made, the basis of the claim. It has to be prepared in advance. We can't take the time to have the calculations made in the courtroom as a part of the testimony. It takes up too much time.

Mr. Rothert: Does your Honor think it would be better to adjourn now? [231]

The Court: We will take a recess until tomorrow morning and see if you can have something in concrete form that can be followed. I see that the witness is using a lot of pencilled notations that he has made, which is very difficult for us to follow. There ought to be something prepared to indicate at least the basis upon which you claim a list of prospective profits can be calculated, something that can be more concrete in form.

Mr. Rothert: I understand that, your Honor, and I would like to ask a question so that the evidence will be as concrete and also as extensive as the Court thinks would be most helpful.

The Court: Mr. Rothert, it is not up to me to advise counsel. I have enough to do to try to decide the case, but I do not like to decide cases in the dark, and if I am obtusive at all in these matters it is because it is unsatisfactory in getting at the matter. You have to do the best you can with it. But this is a rather unsatisfactory method of pro-

cedure. There should be a little more preparation.

Mr. Rothert: Since it happens to be about the end of the afternoon I would request that we adjourn now, and when we start in the morning I will have a statement that may be of assistance.

The Court: Gentlemen, see if you can get the evidence in. Do you have any more witnesses? [232]

Mr. Rothert: We have, yes.

The Court: Many?

Mr. Rothert: No.

The Court: Have them here tomorrow and let us see if we can't proceed a little more rapidly in this case. You gentlemen are being a little leisurely in the presentation of this case. Perhaps it is not altogether your fault. I think this case should have had a pre-trial. Matters should have been agreed upon. That all should have been handled in a pre-trial conference. It may be you are not at fault. If I had this case before I would have made you pre-trial it. The issues that required evidence would have been narrowed. All these documents could have been offered in evidence a long time ago in pre-trial, just put in one after another, given a number without more, on a stipulation that letters were sent or received. I am not blaming you for that. Probably it was not called to your attention. That is one of the great factors, important factors, rather, in the pre-trial procedure, to eliminate much of this time-consuming business.

For instance, the defendant has introduced almost 40 letters. They could have been in in one fell swoop and reference made to whatever you wanted to refer

to at the time of trial. Likewise with respect to the plaintiff's exhibits. I apologize for lecturing you. We have so many other cases, that is one of the reasons we should make use of the pre-trial [233] procedure to eliminate tedious procedures that are not necessary.

Suppose we meet at 10:00 o'clock in the morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Wednesday, November 30, 1955. [233-A])

Wednesday, November 30, 1955—10:15 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Rothert: Ready.

Your Honor, may I make a very brief statement by way of explanation at this time in view of your Honor's justified comments yesterday? We had computed and based the allegations of the complaint as to damages on a theory or on a basis based on the total volume of sales in the commissary stores and what we considered a reasonable percentage of that business available to the plaintiffs on sales of Hunt Foods.

Last week in getting the evidence together we ran into the problem that the total sales of the commissary stores could not be proven with admissible evidence for a variety of reasons or a number of reasons, so that we shifted or adopted a different basis for estimating damages and that was the primary reason why we weren't as well prepared as

we might have been otherwise. And we are ready to proceed with that this morning.

But before calling Mr. Phillips to the stand, I had subpoenaed and there is in court Col. Bivens of the Sixth Army. I would like to call him because it will be very short.

The Court: Very well. [235]

Mr. Rothert: Col. Bivens, please.

COL. ARTHUR L. BIVENS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you please state your name to the Court, sir?

The Witness: Col Arthur L. Bivens.

The Clerk: Please spell your last name?

The Witness: B-i-v-e-n-s.

Direct Examination

By Mr. Rothert:

Q. Col. Bivens, what is your present station and duty in the military, in the United States Army?

A. My station is the Presidio of San Francisco; my duty is as quartermaster to the Sixth Army.

Q. And does the Sixth Army have a certain number of commissary stores at its military bases in this area? A. Yes, sir, it does.

Q. And do you have any information concerning the volume of sales at any of the commissary stores on any of the Army bases under the Sixth Army?

A. I have some information on total sales vol-

(Testimony of Col. Arthur Bivens.)

umes from some of the stores in the Sixth Army area.

Q. Is that for the Presidio and Fort Ord?

A. The Presidio and Fort Ord, yes.

Q. Do you also have information as to the commissary store at the Oakland Army Base? [236]

A. That's right, yes, sir.

Q. Is that under the Sixth Army's jurisdiction?

A. That is not under the supervision of the Sixth Army.

Q. Do these figures you have relate to one year's period from November 1st, 1954, to October 31st, '55?

A. That's right, I believe, yes; November, '54, through October, '55.

Q. And what has become of or what is the availability of similar records or information for prior years to that period?

A. Generally, records are retained for one year after the year in which they are developed, or the year in which they accrued. They are then either destroyed or in some cases returned or forwarded to Kansas City for permanent storage. [237]

Q. Are the records with the information that you have records that go back as far as the records that are now available under your custody? I mean, do you have any other information about commissary sales prior to the year's period covered by this information which you have?

A. I couldn't answer that question. I don't know exactly what is available.

(Testimony of Col. Arthur Bivens.)

Q. I mean right here in your headquarters at the Presidio.

A. Other than the information which I have with me?

Q. Yes.

A. I can't tell you what we do have there without reviewing it and checking it.

Q. These records of sales, how do they come to your headquarters? I will withdraw that. Do the purchasing officers or officers in charge of commissary sales in the Sixth Army make any regular reports of the sales in their commissaries?

A. The commissary officers make regular monthly reports on sales to the office of the Quartermaster General.

Q. Do those reports also come to the Sixth Army headquarters, copies of them?

A. I don't know whether we retain copies of those reports or not. The commissaries in the Sixth Army do retain copies of the reports.

Q. Was this information that you have obtained from the commissary stores from copies of these reports? [238]

A. Yes.

Q. This information, as I understand it, shows a total volume of all sales, the total sale of meat products and the total sale of fresh produce, is that correct?

A. Yes, sir.

Q. Was this information obtained that you have brought with you to court at your direction by people subordinate to you in the army?

A. Yes, sir.

(Testimony of Col. Arthur Bivens.)

Q. Will you state what the dollar volume of total sales for the Presidio commissary store was during the period given of one year from November 1st, 1954, to October 31st, 1955?

Mr. Cullinan: If your Honor please, I will object to the question. The answer would be incompetent, irrelevant, immaterial in this matter. The total volume of sales at the Presidio or any other place would not be material to any of the issues in this action.

The Court: How would it be material, counsel?

Mr. Rothert: In this respect, your Honor: It would tend to indicate that the volume of canned goods sales and purchases at commissary stores is very large and would impose no practical limitation on the opportunities or availability of sales from the quantity of business alone. In other words, if the total amount handled in the whole [239] area is \$100,000 and somebody is trying to get a part of it, it would be an entirely different picture than if there were one million, two million, five million or some huge amount.

The Court: Your question was total volume.

Mr. Rothert: Not limited to canned goods.

The Court: Is this limited to canned goods?

Mr. Rothert: No, it is not limited to canned goods. It is all sales. There have been many statistics——

The Court: Are you able to have the witness break it down?

Mr. Rothert: All the figures that are available

(Testimony of Col. Arthur Bivens.)

are total sales, meat and fresh produce, and I will concede that the volume of canned goods sales is not contained in these figures as any separate item, but, as I understand it, the food business, like many others, has been thoroughly studied and investigated on experience, past performances, and there are accepted percentages, accepted by the industry as a reliable estimate of the proportion of total sales in a super market or a store of that kind, of the total sales.

The Court: I do not want to interrupt you. It doesn't make very much difference whether the figure is admissible or not. It is a question of what weight is there to it. What would it mean, anyhow? If it were preliminary, if you say you would give the figures first—if you are giving the [240] total figures first and then you are going to tie it in with some other data or some other calculations——

Mr. Rothert: I think I can tie it in with proof——

The Court: ——I see no objection to admitting the testimony, but I say to you at the time it is admitted it will be of no value unless it is tied up with something.

Mr. Rothert: I will concede that.

Mr. Cullinan: Also, if your Honor please, the particular records that the Colonel is talking about are for a one-year period just concluded from November, 1954, to November, 1955, limited to three bases.

The Court: He may have other evidence. I think

(Testimony of Col. Arthur Bivens.)

he may present some other data. I don't know. You can't shut off testimony that is partly—that may be—that may have a later relevance to it because at the time it has not got complete relevance because the attorney can't present all of his evidence in one instant of time. I do not think the objection that it is excludable is good. As I say, standing alone, it has no weight whatever.

Mr. Rothert: I do not want to have anyone misunderstand me as to what I am going to do. I will not be able to produce any other evidence of total sales of any other commissary at any other period of time.

The Court: I will allow the question to be answered. I do not think the Court would be justified to just exclude [241] any piece of evidence on the ground it is immaterial. If it appears later that it is not connected up in any way or it has no materiality, you can move to strike it out or the Court will simply not give it weight.

Q. (By Mr. Rothert): Would you answer the question, Colonel? Do you remember it?

A. Yes. I believe it was the total sales of the Presidio commissary.

Q. Yes.

A. I would like to state that these figures have not been authenticated as such, but they were taken from the report referred to.

Mr. Cullinan: If your Honor please, I will object to the figures on the basis that they are unauthenticated figures.

(Testimony of Col. Arthur Bivens.)

The Court: How did you obtained them, Colonel?

A. They were obtained by a person under my supervision from a copy of the report which had been forwarded to Washington.

Q. It was taken from the copy of the report of the Quartermaster of the Sixth Army and sent to Washington?

A. No; a report of the commissary officer prepared by the commissary officer.

Q. Part of your own records?

A. A part of the records of the commissary and of the Quartermaster General in Washington, [242] yes.

Q. You may answer the question.

A. The total is \$2,723,326.53.

Q. For what commissary is that?

A. The twelve months referred to for the commissaries of the Presidio of San Francisco.

Q. (By Mr. Rothert): What was the total for the same period of time at Fort Ord?

A. The same period at the commissary at Fort Ord, the total was \$2,659,452.14.

Q. What is the total sales for the same period at Oakland?

A. For the commissary operated at the Oakland Army Base, it is \$642,865.42.

Q. Will you give the figures for each base during the same period for the meat products and the produce just so that we have all three figures? Is that fresh meat?

A. Yes, the meat market.

Mr. Cullinan: If your Honor please, we will ob-

(Testimony of Col. Arthur Bivens.)

ject to any testimony about how much meat they sold.

Mr. Rothert: I will withdraw the question and say I have no further questions of the Colonel.

The Court: That is all?

Mr. Rothert: Do you have any cross-examination?

Cross-Examination

By Mr. Cullinan:

Q. Colonel, commissaries carry other items than food, do they not? [243]

A. Yes, sir. You mean items like soap and that sort of thing?

Q. Soap——

A. Non-edible items, they do, yes.

Q. Many non-edible items?

A. I would say a substantial number, yes.

Q. Do they sell clothing at the commissaries?

A. No, sir.

Q. Athletic equipment?

A. No, sir, I believe they have nothing——

Q. Do you know whether they do or you are not sure?

A. Well, I can't say that I am positive because I never checked, but I have never known in my experience of an item of athletic equipment in the commissary.

Q. What about drug items?

A. No, sir, they are not carried as a line.

Q. Jewelry, watches and that kind of item?

(Testimony of Col. Arthur Bivens.)

A. No.

Q. They are not carried in the commissary?

A. No, sir. Those items are considered Post Exchange items. That is different from the sales of commissary. Quartermaster's sales commissaries are operated as grocery type operation and carry only those items which are related to food and to commissary store operation.

Q. Except you can buy Vano, mops and that type of thing? [244]

A. Yes.

Mr. Cullinan: I have no further questions.

Redirect Examination

By Mr. Rothert:

Q. Colonel, will you state whether or not there is any limitation or restriction imposed on the commissary stores in the Sixth Army as to the number of brands of any one item that is carried in the commissary store?

A. A restriction as to the number of brand names of a given item which may be carried, yes, sir.

Q. How is that restriction imposed?

A. By regulation.

Q. Do you know what that restriction is? Can you tell us what it is?

A. No, sir, itemwise I cannot.

Q. Is it uniform for all items or does it vary according to items?

A. It varies somewhat.

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

Mr. Rothert: Your Honor, I am handing to the clerk and to counsel a typewritten statement which might be used as a guide to assist the Court and counsel in following the further testimony of Mr. Phillips on the damage issue of [245] the case.

L. W. PHILLIPS

recalled as a witness in his own behalf; previously sworn.

Direct Examination
(Continued)

By Mr. Rothert:

Q. Mr. Phillips, since yesterday have you made any computations with respect to the sales at Alameda Naval Air Station that you covered yesterday? A. Yes, sir.

Q. Were there any other invoices you used in your computations since yesterday that you did not use in the figures that you gave in court yesterday?

A. I computed a similar figure.

Q. I am asking you whether there were any invoices? A. Yes.

Q. You have those additional invoices?

A. Yes, sir.

Q. Where are they? A. In this file.

Q. How many are there?

A. Approximately five—four or five.

Q. At the time you made the computation that you made yesterday from these invoices which coun-

(Testimony of L. W. Phillips.)

sel has returned to me, did you have those five invoices on the witness stand? A. Yes, sir.

Q. You did? [246] A. Did I have them?

Q. Yes. A. I had them, yes.

Q. Was there any reason why you did not include those five?

A. With those? They are a different base.

Q. The ones you got there, are they for Alameda Naval Air Station?

A. Those are for Fort Ord.

Q. I will get at it this way: Have you computed the total sales and the cost of those goods sold for Alameda Naval Air Station commissary for a twelve-month period? A. Yes, sir.

Q. How much were the sales and how much did you pay for those goods?

Mr. Cullinan: I will object, if your Honor please, that this testimony as to what this man sold to Alameda and how much it cost him has no relevancy to the issue of damages in this case. He has taken some invoices, he has listed the total sales he made in a particular period of time to a particular base. That lays no basis for any kind of a foundation for the establishment of the possible prospective damages.

The Court: I do not quite follow you on that. He has to start some place. All he is doing is analyzing the figures of the sales that were actually made. In and of [247] itself, of course, it does not prove any damages, but I would think it might have some relevance, relevance with respect to the volume of

(Testimony of L. W. Phillips.)

business done and the profit of that business during the period he was operating.

Mr. Cullinan: For instance, the average per cent of profit was about a certain percentage in a twelve months' period at Alameda when he was starting in business. That is not relevant to any issue in this case. If he wants to show——

The Court: I do not quite follow you. Why wouldn't it be relevant?

Mr. Cullinan: As far as damages go, it has no bearing on what damages the man might suffer in the future.

The Court: Well, the man is in business for a year and he wants to show he would lose some business—there's a basis for showing how much he might make next year.

Mr. Cullinan: That is my point.

The Court: When you sell a piece of real estate, you show the income of the property for a period of time and upon the basis of that you calculate what the income from the property would be in the future. I just do not quite get what your point is. You have to start some place in the process of producing evidence. I do not see anything. Maybe it won't demonstrate there was any profit, but I don't see how I can shut the mouth of the witness on something that might have some relevancy. Overruled. [248]

Q. (By Mr. Rothert): Do you have your notes with you, Mr. Phillips, as to the Alameda Naval Air Station? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. I am giving you this typewritten memorandum merely for whatever assistance it might give you. Was that typed up from figures which you computed yourself? A. Yes, sir.

Q. State what the total sales of the Alameda commissary were during the twelve-month period and the amount that you paid for that merchandise and the gross profit from those sales.

A. On the sales that are listed we paid \$10,806.87.

The Court: When you say on the sales that are listed——

The Witness: The twelve-month sales.

The Court: Yes, but what is the amount?

The Witness: The cost?

The Court: No.

The Witness: The amount of sales?

Mr. Rothert: You suggest that on the sales that were listed.

The Court: That does not mean anything for the record.

The Witness: The twelve-month sales of the Alameda commissary stores were the reselling price; we received \$11,586.01.

Q. (By Mr. Rothert): And how much did you pay Hunt Foods [249] for that same merchandise?

A. \$10,806.87.

Q. Did you pay Hunt Foods for all of that merchandise? A. Yes, sir.

Q. You may recall that yesterday you gave some figures, approximately \$10,800, for the total sales,

(Testimony of L. W. Phillips.)

and \$10,050 for the total purchases. Can you explain why these figures are different from the ones you gave yesterday?

A. You have an invoice in your file that I didn't have on a percentage you wanted to show, and I added that invoice to this total and there is the variance.

Q. Did you also compute the amounts of the sales and cost for the first ten orders at Alameda during that twelve-month period? A. Yes, sir.

Q. What were the amounts of the sales and the costs and the gross profit from the first ten orders?

A. We paid or we sold the merchandise for \$2,196.13. We paid \$2,058.73.

Q. Did you do the same computation for the last ten orders of that twelve-month period?

A. Yes, sir.

Q. What were the sales and costs for those ten orders? A. We sold——

Mr. Cullinan: If your Honor please, I would like to [250] object. There is no showing here that the market remained the same or what the basis—why he took the last ten orders and the first ten orders. I think that ought to be brought out as to what these orders are.

The Court: I suppose he is endeavoring to show that in times past it was more favorable to a profitable operation.

Mr. Rothert: There is an increase in the profit margin and an increase in the volume.

The Court: I will overrule the objection.

(Testimony of L. W. Phillips.)

A. Our selling price of the merchandise was \$3,715.34. Our cost was \$3,362, and I believe it is seven cents.

Q. (By Mr. Rothert): Did you have any reasons for picking out the Alameda commissary stores for this analysis? A. Yes, sir.

Q. What?

A. We had 54 items of Hunt foods in there which gave us a cross-section as to the variety of sales of most of their merchandise. We picked the high one and the low one.

Q. When you say 54, is that items and sizes?

A. And sizes, yes, sir.

Q. When you first started contacting the Alameda commissary, were they handling Hunt's products? A. They might have——

Mr. Cullinan: If your Honor please, I object to that. This witness is not qualified to know whether they were [251] purchasing Hunt products. He is neither with the air station nor is he with Hunt Foods. He is just a man in the food business. We might as well ask any customer whether they were selling Hunt Food products. No customer would be qualified to testify to that.

The Court: I will overrule the objection.

The Witness: The records that we received from Hunt——

Mr. Rothert: No——

The Witness: This is a lead-up to the question. You want it answered?

(Testimony of L. W. Phillips.)

The Court: Don't you tell him what it is going to lead up to. Listen to the question.

Q. (By Mr. Rothert): Did you visit the Alameda Naval Air Station commissary early in the period you started selling Hunt products?

A. Yes, sir.

Q. Did you look at the shelves in the commissary when you visited them? A. Yes, sir.

Q. Did you make any investigation to determine what was being sold there by brands and so forth?

A. Yes, sir.

Q. When you did that, did you see whether any of Hunt's products were then being sold, on the shelves for sale? A. I didn't see any. [252]

Q. What was the total number of cases sold to the Alameda commissary for twelve months of all items and sizes?

A. 2,145, I believe the figure is.

Mr. Rothert: Your Honor, I am going to skip the things that are merely mathematical computations as far as testimony is concerned.

Q. Did you make any similar analysis for the business you did at Fort Ord? A. Yes, sir.

Q. What period of time did you select for Fort Ord? A. January, 1953, until April of 1953.

Q. Four months? A. Yes, sir.

Q. Why did you pick only four months for the Fort Ord commissary?

A. That is when we received the same items over the same period of time, so we had a correct analysis.

(Testimony of L. W. Phillips.)

Q. When you say the same items, do you mean the same 54 items and sizes?

A. No; the same nine items and sizes that we were selling.

Q. What was the experience at Fort Ord before January, 1953, as far as your sales there were concerned?

A. Some months we would sell them five items; other months we would sell them nine; other months we would sell them four, six, and a variety of items. So we didn't have any [253] correct analysis.

Q. What was there that makes the sales of the four months started January, 1953, any different from the sales prior to January, 1953?

A. We were able to sell them the items continually for the four months.

Q. More consistent sales?

A. That is right.

Q. During that four months' period, what was the total sales to Fort Ord and what was the purchase price to you for the same merchandise?

A. Our selling price for the four months was \$4,360.50.

The Court: No; you are looking at Hamilton.

Mr. Rothert: On the typewritten sheet?

The Witness: I am sorry. \$6,344.42.

Q. (By Mr. Rothert): Where are you looking at now? A. I looked at Hamilton. \$6,344.42.

Q. What was the cost of it? A. \$6,053.97.

Q. Did you say 53?

(Testimony of L. W. Phillips.)

A. \$6,053.97. Or is it 33? It is 33, I guess. This type is not so very clear.

The Court: Should it be 53?

A. 33.

Q. (By Mr. Rothert): What was the gross profit? [254]

A. Mathematically there is a \$310.45 difference.

Q. How many items and sizes were sold at Fort Ord during that same period? A. Nine.

Q. What was the total number of cases sold in those four months? A. 1,205.

Q. Did you make a similar study of the business done at Hamilton Air Force base?

A. Yes, sir.

Q. What period did you select?

A. January, 1953, until April, 1953.

Mr. Rothert: There is a mistake on the type-written sheet, your Honor. It should be January, 1953.

Q. Why did you select those four months rather than some other period?

A. We found a number of items selling consecutively during that period of time so we could correctly make an analysis. Otherwise you could not if there were skips anywhere.

Q. In the period before January, 1953, how did the sales go?

A. Well, the sales were spotty. Some months we would get a large order, other months we would get a small order. Some months—they would vary that way until we got a line out and Hunt's in.

(Testimony of L. W. Phillips.)

Q. You studied the sale price that you received from [255] Hamilton Air Force base and the cost of those items to you during that four months' period?

A. The selling price was \$4,360.50. Our cost was \$4,191.70.

Q. With a gross profit of \$169.80?

A. Yes, sir.

Q. What was the number of items and sizes sold at Hamilton Air Force? A. 33.

Q. What was the total number of cases sold during that four-month period? A. 645.

Q. Did you study the invoices and records to determine whether there were certain items that were sold out of the three of those bases, Alameda, Hamilton and Fort Ord? A. Yes.

Q. What were those items that were common to all three bases?

A. Hominy, tomato sauce, pears, ketchup, tomato paste, tomatoes, 300; tomatoes, 2½, and the common—that was common to all three—common to Alameda and Ord was blackberries and new potatoes.

Q. Using the items you have just named that were common to the three bases in your sales, did you compute the average number of cases per item at each of the three bases? A. Yes, sir. [256]

Q. What was that average for each base?

A. Five in Alameda, eight in Hamilton, and 33½ at Fort Ord.

Q. I didn't ask you what was the percentage of

(Testimony of L. W. Phillips.)

profit on the four-month sales of the Fort Ord commissary that are covered by your previous testimony. A. Five per cent.

Q. What was the percentage of profit at the Hamilton Air Force commissary for the four months that you covered in your previous testimony? A. Four.

Q. Was it one of these three commissaries that you did not handle right from the beginning?

A. Yes.

Q. Which one?

A. Hamilton Air Force base.

Q. When did you start to make sales to Hamilton, approximately?

A. About December, 1952.

Q. Did you make any attempts to sell to Hamilton before December, 1952? A. No, sir.

Q. Why?

A. Hunt Foods asked me to let that base alone until their man was transferred over there, as he was a very close [257] friend of Mrs. Bennett, the buyer, and I said, "That is fine with me because I will be very busy with this other stuff."

Q. During this period—by this period, I mean the time that you were selling Hunt Food products—how did the price of the Hunt's items compare to the competing lines during the same time?

Mr. Cullinan: Just a moment. When you say competing lines, you should be specific. I object to the question, if your Honor please. I think it ought to be specific. Does it compare with S&W, does it

(Testimony of L. W. Phillips.)

compare with somebody else's brands? Just how does it compare with all your commodities——

Mr. Rothert: What were the brands of food products that you found were being sold in the commissary stores during the same period of time in the same items that Hunt sold?

A. My competition was S&W, Wellman, Sunblest and Conference.

Q. Were there any others? Was that all the competition?

A. There would be some items on various brands, but that was the principal competition. Those people were actively soliciting the commissary business.

Q. How did Hunt prices compare with the prices of each of those brands that you have mentioned?

Mr. Cullinan: Excuse me. Of which time are we talking?

Mr. Rothert: Throughout the entire period of December, [258] 1951, to and including April, 1953.

Mr. Cullinan: If your Honor please, I object to this question. I think first it ought to be established that there was a standard of comparison all through those years. Here we have a 12 to 13 months' period.

The Court: I think that is a little technical, counsel. I will overrule the objection.

The Witness: The question again?

Q. (By Mr. Rothert): State what the difference, if any, or the relationship between the prices on the Hunt products and the prices for the competing lines you just enumerated a moment ago

(Testimony of L. W. Phillips.)

during the time that you were handling the Hunt line in these commissary stores.

A. The difference was 22 per cent.

The Court: What does that mean?

A. The difference between the Hunt—the cost of Hunt merchandise and what the competing selling price on the shelf of other brands that we saw was.

Q. (By Mr. Rothert): Was that a uniform difference throughout all items and sizes? Is it an average or what?

A. It is an average.

The Court: Did you calculate that average?

A. Yes, sir.

Q. (By Mr. Rothert): Was there any competing items of any of those competitors you named that was priced below the [259] price of the Hunt item, the same item produced by Hunt at the same time?

A. No, sir.

Q. Was there any competing item that was priced as low as the price for the same item produced by Hunt at the same time?

A. In these brands that I spoke of?

Q. Yes.

A. Were they lower than Hunt's prices?

Q. As low as.

A. No, sir.

Q. Was there any item during that period of time produced by Hunt's that was not priced below all the prices of the competing items, competing brands of the same items you just enumerated?

A. The Hunt's costs to us were never higher

(Testimony of L. W. Phillips.)

than the selling price on the shelves of these brands of which we speak.

Q. The question was, was there any item at any time of the Hunt's line that was not priced below the price of all the competitors? A. No——

Mr. Cullinan: May I have that question and answer read?

(Question and answer read.)

The Witness: All the competitors that we list here. [260]

Q. (By Mr. Rothert): There is no question. You say something about all the competitors that were listed here? Were there some competing items or brands that you did not mention that were priced as low as Hunt's at any time?

A. We never saw them. These here were the items in the stores and due to their limitations they were limited to certain numbers and these were the ones we saw.

Q. Did you ever see any Del Monte or Libby products on sale at the commissary stores?

A. A few, yes, sir, a few priced higher.

Q. Did you ever see Stokely?

A. I never did.

Q. Were there any other commissary bases where the purchasing officer had indicated that he would install the Hunt line but it had not been installed prior to the termination——

Mr. Cullinan: If your Honor please, this is hearsay to Hunt Foods as to what this man and some

(Testimony of L. W. Phillips.)

commissary officer discussed as to what might happen in the future.

Mr. Rothert: May I add to that question, then, in the presence of any representative of Hunt Foods?

The Witness: Yes, sir. [261]

Q. Who was the representative of Hunt's Foods who was present? A. Mr. Steiger.

Q. In what commissary store was that?

A. Mather Air Base at Sacramento.

Q. Is that the only one or were there any others?

A. At Mare Island Naval Supply—Mare Island commissary store at Mare Island under Commander Shea.

Q. When did that occur?

A. I would say it was in March or April of 1953.

Q. Mr. Phillips, you have stated that you were with Safeway Stores for a number of years. At any time during that period were you in any department that studies the statistics of the food industry? A. Yes, sir.

Q. In what department was that?

A. In Safeway's analytical department which sets up records for buying—for purchasing and supplies.

Q. When were you in that department?

A. 1941 and again in 1945; see, it was '41 and again '45. A short while in '45, but the full year of '41.

Q. Have you at any time during your business

(Testimony of L. W. Phillips.)

experience made studies and studied reports of statistics concerning the canned food industry?

A. Yes, sir, for ten years as a buyer for [262] Safeway.

Q. Are there any published statistics concerning the sales of canned foods in that industry?

A. Yes, sir.

Q. Is there any percentage that is regularly accepted in the canned food industry as the percentage of total grocery store and super market sales that represents the sale of canned goods alone? Don't state the percentage; I am just asking you whether or not there is.

A. Yes, sir.

Q. In that business, what is the percentage of total sales in super markets and grocery stores that represent sales of canned food alone?

Mr. Cullinan: If your Honor please, I will object to this on the ground that it is incompetent, irrelevant and immaterial and on the further ground that this witness is not qualified to testify as to any statistics. What the statistics are for super markets may not have any relation to a commissary.

The Court: What was that last question, Mr. Foster?

(Reporter read the question.)

The Court: Well, I think the objection is good. What the percentage of canned goods sales in super markets is, even if you were competent to give

(Testimony of L. W. Phillips.)

those figures, doesn't seem to me to be material. I will sustain the objection.

Q. (By Mr. Rothert): From your experience and observation [263] with commissary stores and super markets, Mr. Phillips, are there any differences in the operations that would vary or change the proportion of canned goods sold out of total sales in commissary sales and super markets?

A. Yes, sir.

Q. What are those factors that would create any difference?

A. One factor is the limitation on brands involved. Instead of having eight brands of peas, they are allowed four. That would increase the sale of the brands that were there. Another limitation is——

Q. Just a moment. I am talking about total sales, not larger volumes for any one brand.

A. Total sales?

Q. Just the proportion of the total sales in the whole store represented by the total sales of canned foods whether there is one brand or a hundred brands in those total sales of canned foods.

A. There are three factors. One factor is the matter of the buying power of the personnel. The average buying power of the personnel is \$235 a month.

Mr. Cullinan: Just a minute. If your Honor please, I will move to strike that last answer.

Mr. Rothert: I will stipulate that it is hearsay.

The Court: Yes, this is far afield.

(Testimony of L. W. Phillips.)

Mr. Rothert: As I understand it, your Honor—I don't [264] want to make a statement in front of the witness either.

The Court: I don't quite see the point of this examination.

Mr. Rothert: I will explain it.

The Court: Obviously there is a lot of canned goods sold. Is that what you are trying to show?

Mr. Rothert: Well, in substance, yes. I understand there is an accepted percentage in the industry that out of all sales in the industry—sales in super markets, for instance——

The Court: I don't think it would have any materiality at all. Of course, there is a lot of business. It is just a question of how much business this witness would have done if there is evidence to that effect.

Q. (By Mr. Rothert): Now, Mr. Phillips——

The Court: I think perhaps we will take a brief recess at this time.

(Recess.)

Q. (By Mr. Rothert): Mr. Phillips, you have computed the relationship in the volume of sales of common items in the three commissary stores, Alameda, Hamilton and Fort Ord; I think you named those items? A. Yes, sir.

Q. And stated an average number of cases per item. What do your records show—take two or three examples—of the [265] number of cases sold

(Testimony of L. W. Phillips.)

per month, average number of cases sold per month of tomato sauce at those three bases.

A. What did our records show?

Q. Yes.

A. 15 in Alameda, 10 in Hamilton and 30 in Fort Ord.

Q. And what does it show as to tomatoes, the two sizes?

A. The 300 size shows 6 Alameda, 10 Hamilton and 46 at Fort Ord.

Q. The 2½ size?

A. Shows 6 in Alameda, 10 Hamilton, 77 at Fort Ord.

Q. Take pears, size 300.

A. Shows 3 in Alameda, 6 in Hamilton and 41 in Fort Ord.

Q. My copy shows 8 at Hamilton; is that right?

A. 8. I am sorry. 8, yes.

Q. In what way does the difference in volume of sales of these common items enumerated at the three bases indicate that future sales of the Hunt line in the Hamilton and Fort Ord commissary stores?

Mr. Cullinan: I will object to that, if your Honor please. That calls for the opinion and conclusion of this witness.

The Court: Yes; sustained.

Q. (By Mr. Rother): In your opinion, Mr. Phillips, had your sales of the Hunt line not been terminated when it was, would you or would you

(Testimony of L. W. Phillips.)

not have made a profit from the sale [266] of Hunt's products during the year 1953?

Mr. Cullinan: I will object to that, if your Honor please, as calling obviously for the opinion and conclusion of this witness.

Mr. Rothert: I will concede that it does. That is why I framed the question that way. If he is unable to testify to these matters, I suppose that would leave those matters to the realm of the argument, someone else's opinion.

The Court: Well, I suppose he could give testimony, on the basis of the experience of the year, as to what a certain volume of business in the future would produce by way of profits. That may be admissible.

Mr. Cullinan: But he is asking the witness for——

The Court: I think the question that you have objected to as improper in the form that it is asked.

Mr. Cullinan: I think that even that whole theory, your Honor, would be to have the witness testify to what a judge or jury, if there had been one, would have to decide from the previous experience, not this witness' guess or estimate of what he might have done.

The Court: If he says he did, let us say, 11,500 cases in dollars' worth of business at Alameda in twelve months, in a twelve months' period, I think he is competent to testify to what his estimate would be as to the volume of business he would be able to do in the next year and what the [267] percent-

(Testimony of L. W. Phillips.)

age of profit would be on the increased volume of business because that was his own business.

Mr. Cullinan: Well, there has been nothing established in the evidence so far of past history of previous years that would be any indication of what is going to happen next year profitwise or volumewise.

The Court: There never is in these cases where it is sought to recover for speculative profits. How can you tell if the business is cut off at a certain point? It has to be on the basis of estimates; it can't be on the basis of actuality, because you wouldn't be here in court. I am assuming that a breach of contract is shown and you reach the point where the case proceeds on the theory of the loss of prospective profits. It has to be on some basis of estimate. I suppose the trier of the fact could draw some conclusion; he would have to have some basic facts to go on.

Mr. Rothert: I can ask him——

The Court: I think you have already asked him some questions along that line as to the proportion in which the cost of doing business would increase on increased volume.

Mr. Rothert: Yes, I have, your Honor. I could ask him some questions on assumptions rather than opinions.

The Court: Frame some other questions. I think the present question is objectionable.

Q. (By Mr. Rothert): Mr. Phillips, if you assumed that in [268] the Fort Ord commissary the

(Testimony of L. W. Phillips.)

same number of items and sizes or an equivalent number of items and sizes of Hunt products were purchased and sold by that commissary, can you state approximately what volume of sales you would make to Fort Ord—— A. Yes, sir.

Mr. Cullinan: If your Honor please——

Q. (By Mr. Rothert): In one year.

Mr. Cullinan: I will object to this question as calling for the opinion and conclusion of this witness and point out to your Honor that he has already testified as to Fort Ord that he took a four months' period because sales before that had been pretty sporadic, so he took a specially selected four months' period. From that he has estimated into a twelve-month period. Now, he wants to estimate on the estimate as to what would happen in the next twelve-month period. He has already admitted that at Fort Ord it was sporadic and that is why he picked the particular four months.

Mr. Rothert: I think he is entitled to use the improvement he had accomplished at the time of the termination.

Mr. Cullinan: If any.

The Court: I think I would allow that. I will overrule the objection. [269]

A. I would show that we would do about \$84,000 a year in Fort Ord, which is seven times Alameda.

Q. (By Mr. Rothert): Assuming that you sold the same number or an equivalent number of items and sizes at Hamilton Air Force Base that you had sold to Alameda in the twelve months' period of

(Testimony of L. W. Phillips.)

your experience at Alameda, can you state approximately what quantity of business you would have had at Hamilton Air Force base?

Mr. Cullinan: Same objection, your Honor.

The Court: Overruled.

A. About \$18,000.

Q. (By Mr. Rothert): From your observation in the work that you did at these commissary stores—I don't mean just these three, but all 19—were there any other commissary stores at military bases as large as the three, Alameda, Fort Ord and Hamilton? A. Yes, sir.

Q. What were the others that were as large?

A. Presidio, Mather Air Force base, Castle Air Force base.

Mr. Cullinan: When you use the word "large," are we referring to personnel?

Mr. Rothert: I meant personnel and activity in the commissary stores, not large in the size of the territory. Was that the way that you understood the question and the answer you gave? [270]

A. Yes, sir, I understood you asked for the volume done, the percentage of volume done in Alameda, Ord and Hamilton.

Q. Yes, compared with the other 16.

A. Yes, sir; what commissaries compared with those three, yes, sir.

Q. With the same assumptions I have previously stated as to getting the same or equivalent items and sizes in all three, Alameda, Fort Ord and Hamilton commissary stores, what volume of

(Testimony of L. W. Phillips.)

sales would you be able to make to those three commissary stores in one twelve-month period?

Mr. Cullinan: I will object to this, if your Honor please, in addition to the other grounds previously stated that we have no evidence before us as to what kind of business he did at Castle Air or these other places.

Mr. Rothert: This only applies to three, Alameda, Hamilton and Fort Ord. It is really just a computation of adding up the three separate items, that is what it is.

The Court: I will overrule the objection if you change the question to read, would he estimate, rather than would he be able to produce.

Mr. Rothert: Yes.

Q. What do you estimate would be the volume of business at those three named air commissary stores if you sold to all three of them the same or an equivalent number of items and sizes which you actually did sell to Alameda in that [271] twelve-month period? A. \$111,000 plus.

Q. Assuming a volume of business of that amount, to what extent would your cost of doing that business be increased over the cost of business you actually had in the sales you actually made to those three bases?

A. There would be very little increase due to the systematic method of government purchases.

Q. Will you explain what you mean by systematic method?

A. Certain times for certain orders, and you

(Testimony of L. W. Phillips.)

had to go service the base anyway, whether you got one case or four thousand, you should go see the base, which we did, and that cost was in the first cost, and if you got an order for 4,000 cases there it was. The time element would probably increase some but your travel would be the same; you couldn't go any farther than Camp Beale or any farther west than Parks and you couldn't go any farther south than the southernmost base, which we did. You couldn't go any farther in the central part of the base than McClellan and Mather, and that is the way it was.

Q. How about the cost of office expense?

A. Office expense would increase slightly because of the billing, because your billing on 54 items at one case is no more than 54 times at a hundred cases each, and we were billing several items. [272]

Q. What do you estimate your margin, your percentage of profits would have been on that assumed quantity of business in the year following the time when your selling of Hunt lines was terminated?

Mr. Cullinan: If your Honor please, I will object to that. There is no foundation laid for any estimate what the cost of the man might be or anything that might give an estimate of what the profits might be, the cost of billing, as an example. We have to have something that shows what the cost of billing might be.

The Court: Read the question.

Mr. Rothert: Maybe I could clarify that. I meant my question to refer to the gross percentage

(Testimony of L. W. Phillips.)

of profit; that is, the difference between the cost to him of purchasing the items from Hunt and the price at which he would sell them to the commissary stores eliminating office expense and travel expense.

Mr. Cullinan: Same objection.

The Court: Overruled.

A. You want to know—can I have that question again? It was asked twice. Would you read the question?

(Question read: “Q. What do you estimate your margin, your percentage of profits would have been on that assumed quantity of business in the year following the time when your selling of Hunt lines [273] was terminated?”)

Mr. Rothert: That is in the next year after you were terminated.

The Witness: What would our profit have been?

The Court: In the next year; gross profit.

Q. (By Mr. Rothert): The percentage of gross profit on the assumed \$111,000 or whatever it is of business.

A. In these three bases if we were in there the next year we would have grossed 20 per cent.

Mr. Cullinan: I see the witness is referring to some memorandum there. I would like to ask the witness if he is using that memorandum in connection with the answer just given. If he is, I would like to see the memorandum.

(Testimony of L. W. Phillips.)

Q. (By Mr. Rothert): What were you looking at?

A. I was watching our progress percentages from one part of the year to another to answer his question. I only have the progress figures here from the first of 1952 to the end of 1952 and up until they closed—they took the line away from us in '53. And we have to project that figure, of course, and that is what I was looking at, the figures here.

Q. What are those figures you were looking at, an adding machine tape or something?

A. That is the sales to Alameda Air Station and our profit for the first ten orders and the profit for the last ten orders, and the difference. [274]

The Court: That is the figure you have already given?

A. Yes, sir.

Mr. Cullinan: And that is the basis on which you are making these answers to the last question?

A. That and the figures we have of competitive items that were shown on the shelves at that time. We have that here, every item that was on the shelves and the price it sold for and what we thought we could sell for, and certain items we were selling we were up to these prices, getting that percentage.

Q. (By Mr. Rothert): What is your estimate as to the maximum percentage of gross profit you could have obtained from the sale of the Hunt line after it was terminated?

Mr. Cullinan: What was the question?

(Testimony of L. W. Phillips.)

Mr. Rothert: What is his estimate as to the most favorable percentage of gross profit he could have made in the selling of the Hunt line subsequent to the termination?

Mr. Cullinan: Same objection.

The Court: As to these three stations, you are limiting it?

Mr. Rothert: I am limiting it to these three stations.

Mr. Cullinan: Same objection.

The Court: Overruled.

The Witness: For the following year? [275]

The Court: He has already answered as for the following year.

Mr. Rothert: He has answered as for the following year; he said 20 per cent, as I remember.

A. Yes, sir.

Q. What is your estimate as to whether you ever would have been able to make any profit greater than 20 per cent for a year's business at those three bases?

A. We were averaging on certain items—on the full line when we first started, we averaged one per cent.

Q. Well, just—

A. Well, I will have to answer the question this way so you will understand it.

The Court: No; we will understand you all right if you just answer the question.

Q. (By Mr. Rothert): Could you or could you

(Testimony of L. W. Phillips.)

not have, in your estimate, have made more than 20 per cent gross profit on a year's sales?

A. Yes, sir.

Q. How much more than that?

A. A maximum of 25.

The Court: What is the basis of your answer to that extra 25 per cent? How do you calculate that?

A. That is, if we moved up to everybody and our lines only were in, in which basis we had that condition in some; [276] or if we had two or three lines in that would be reduced because we would be a fraction under on some certain items and we would drop the five. It depends on the condition we were in in the base.

Q. (By Mr. Rothert): What is your estimate as to whether or not, had the arrangement not been terminated, you would have succeeded in getting more items than the 54—more items and sizes than the 54, into and selling to the Alameda Air Base commissary?

Mr. Cullinan: I will object to that, if your Honor please. He had a year to do it in. This would be just a guess as to what he might do if he knew and had a friend in the commissary. He has already said that the sales to the commissary depends on who the supply officer is.

Mr. Rothert: He didn't testify to that at all.

The Court: Not necessarily. I assume you have some loyalty to your client, and, therefore, the merits of the products might have something to do with it.

(Testimony of L. W. Phillips.)

Mr. Rothert: Your Honor, I don't think this witness has testified that his sales depended on any friendship with the commissary officer. He hasn't testified to that. That is an argument that Mr. Cullinan has made here.

The Court: I will overrule the objection.

The Witness: May I have the question read?

Mr. Rothert: May I withdraw the question temporarily? [277]

I will withdraw the question temporarily.

Q. How many different sizes and items of Hunt products were there during the period that you sold the line? A. In Alameda?

Q. No, how many did Hunt's make and have available for sale?

A. Approximately 100 items and sizes.

Q. And of those you had 54 in Alameda?

A. Yes, sir.

Q. What is your estimate as to whether or not you would have gotten additional or more than 54 items and sizes into the Alameda Air Base had you not been terminated?

A. It was a matter of time until they saw how the line sold, until they were being well satisfied, until they put the complete line in. That was our policy, and that is to eliminate bookkeeping and trouble.

Mr. Rothert: I have no further questions.

Mr. Cullinan: Does your Honor wish to adjourn for the noon luncheon now? We might be able to speed up the cross-examination.

(Testimony of L. W. Phillips.)

The Court: Would it be inconvenient for you to start your examination now?

Mr. Cullinan: No, your Honor.

The Court: I think we might use the time. I am confronted with some other matters that are commencing to come my way, and unless it is inconvenient for counsel, I would [278] like to proceed now. I have to wait for the report of the Grand Jury anyhow. If it is convenient, go ahead.

Cross-Examination

By Mr. Cullinan:

Q. You testified, Mr. Phillips, that you picked the period of four months at Fort Ord because the sales were sporadic before that at Fort Ord?

A. The word "sporadic" means, in my language, the items were not all in consecutively, so we could get an analysis. If you had tomatoes in one month and something else in another month, unless you had an even flow of business, you wouldn't have any estimate at all. You would have no way to analyze.

Q. When you started selling at Fort Ord, that was when?

A. They were selling Fort Ord when I took it, some items.

Q. December, 1951, you started at Fort Ord?

A. Yes, sir.

Q. From December, 1951, to January, 1953, the sales were spotty to Fort Ord?

(Testimony of L. W. Phillips.)

A. The sales would vary from a thousand dollars down to \$735 and \$688, \$650, and that is what we call sporadic. That shows the items were not in there all the time.

Q. The items were not in there consistently during the year 1952?

A. That is right; enough items to give us a pattern.

Q. And the same is true of Hamilton?

A. Yes, sir. [279]

Q. You stated that there was a difference of some 22 per cent between the Hunt line and the products of S&W, Wellman, Sunblest and some others you mentioned?

A. Yes, sir; our contracts show that.

Q. Isn't it a fact that S&W, Wellman and these others are the fancy packed type of canned goods?

A. Well, according to Hunt, they told the commissary officers to tell us it was good.

Q. Answer the question.

A. Yes. Which brand is fancy?

Q. Let us take two examples, S&W and Wellman. A. Wellman is not all fancy.

Q. Let us start with S&W. S&W is a fancy pack brand, isn't it?

A. It is supposed to be.

Q. It is, isn't it?

A. It is supposed to be.

Q. You do not know? A. I don't know.

Q. S&W is always a high-priced product, isn't it, compared with its competitors?

(Testimony of L. W. Phillips.)

A. Not necessarily. No, S&W is not the highest priced of canned goods in this cannery.

Q. Is there any throughout this area that is higher? A. Is there one higher? [280]

Q. Yes.

A. It is possible to find it on the shelves. We have the report here.

Q. I am asking you what you know.

A. That is what I know.

Q. You have been in the business for many years? A. Yes.

Q. You can't tell us whether there is a brand that is higher than S&W? A. I can tell you.

Q. Can you tell me what the brand is?

A. Wellman was.

Q. Wellman was? A. Yes.

Q. S&W and Wellman are both high-priced brands, aren't they?

A. Again you would have to clarify "high-priced." Our records here show that they were not out of the ordinary. We had averages here. We have the figures for you.

Q. Mr. Phillips, when you compared Hunt's with S&W and Wellman brands——

A. Yes, sir.

Q. You are comparing what pricewise would be a Ford with a Cadillac, are you not?

A. No, sir; not by a long shot. We got samples in town that were pretty good. [281]

Q. I am talking about pricewise, not quantity-wise. A. Pricewise there is a difference.

(Testimony of L. W. Phillips.)

Q. The S&W brand, for instance, the can is a fancy packed, a certain number of—we will say pieces of fruit in a can. Isn't that the fancy type of brand?

A. I don't think they're as fancy as you state the fact. We have never found it that way.

Q. Was there any brand on the shelves that was selling for lower than the Hunt brand?

A. There could have been some substandard brand or unknown label, but Hunt, being nationally advertised, there weren't any national advertised brands on the shelves selling below Hunt.

Q. Your comparison of difference did not take into account any of those brands?

A. Which brands are you talking about?

Q. The ones that were lesser known and selling about the same price or less?

A. Well, due to the limitation on items, those lesser brands, we didn't find them because we carried the contracts with us, we knew what they had. We knew what items they were selling, because we had the price lists or we had the contracts which are over here.

Q. At any of the commissaries did you find a brand selling at the same or less than Hunt's price on the shelves?

A. That we were selling them for? [282]

Q. Yes. At any of these commissaries were there any can brands selling at the same or less than the price of Hunt's on the shelves?

(Testimony of L. W. Phillips.)

A. There were some cans without a brand, but they couldn't sell them.

Q. Cans without a brand? A. Yes, sir.

Q. Steel?

A. They would be an issue item and they always had trouble. The housewives wouldn't buy them. They would come out of the issue. They would draw them out, but they didn't buy it.

Q. There was no question that there was no can with a label that was selling at or below the Hunt's price?

A. Not in the same quality of well-known brand, no, sir.

Q. Just answer the question. Were there or weren't their brands selling? The same product, without regard to quality, now, at the same or below the price of Hunt's on the shelves.

A. We didn't find it.

Q. Your previous question suggested it might have been that the quality was not as good. Were there any canned goods on the shelves which, in your opinion, were of lesser quality than Hunt's that were selling at the same or less than Hunt's?

A. We would find merchandise at times, spotty sales of something. They would buy some item. But most of them—I would say all the time Hunt's prices were—do you mean, did I find [283] any brand ever at all selling under Hunt's? Well, that is impossible to answer that question. I don't know what kind of a question that is. How can I answer

(Testimony of L. W. Phillips.)

that, did I ever see any brand at any time sold under Hunt's?

Q. On the commissary shelves during your time. A. I never did, no.

Q. You never did?

A. On the list I had there was nothing in Hunt's in the commissary stores that were handled.

Q. Did you ever see the Del Monte brand?

A. Yes, we did, and we have a list of Del Monte prices out in the commissary stores.

Q. How did the Del Monte price compare with Hunt's price?

A. They were higher. We have the record.

Q. How much lower was Hunt's than Del Monte brand?

A. It averaged about 18 per cent on some items, 25 per cent on some items, 6, 7, 8 to 10 per cent on some items. The average was $17\frac{1}{2}$ to 22 per cent. I have the record here.

Q. Have you studied the record so you can say what the difference is, the percentage of difference was between Hunt's and Del Monte on the shelves?

A. Yes, it was our business to know. Otherwise, we didn't want to sell it.

Q. What was the difference between the price that S&W goods were being sold at compared with Hunt's? What is the [284] percentage of difference? A. About 27 or 28.

Q. What about Wellman?

A. Well, would this help you if I read you some prices we have off the list?

(Testimony of L. W. Phillips.)

Mr. Rothert: Answer the question, Mr. Phillips.

The Witness: I would say Wellman was a fraction above S&W.

Q. (By Mr. Cullinan): Above S&W?

A. Yes, a fraction.

Q. You mean 28 or 29 per cent above Hunt's?

A. Will you give a specific item?

Q. Let us take pears.

A. Pears, yes, sir. No. 1 tall pears, of which we have been talking about here, Hunt's cost to us at the time were approximately \$6—\$8.15. On a competitive basis we could have gotten \$11.47 for them. And our records show that we were doing that more than——

Mr. Cullinan: I move to strike that answer, if your Honor please. That is not an answer to the question at all.

The Court: He wanted to know on pears if you could give the prices of Wellman and Del Monte.

Mr. Cullinan: Wellman, Hunt's or Del Monte.

The Witness: Well, unfortunately, Wellman and S&W—no one packed that size pear. That is a sort of offsize. Wellman packs a 303, Hunt packs a 300. [285]

The Court: Can you give any examples?

A. Yes, sir. 2½ pears at the time this survey was made, Hunt's price to us was \$6.90, I believe this shows, and our selling price that we could have gotten was \$9.36.

Q. (By Mr. Cullinan): The question was, what was the price of the competitors?

(Testimony of L. W. Phillips.)

A. I just gave it, \$9.36.

Q. \$9.36? A. I will tell you that.

Q. You picked the pears. Give me the price for S&W, Wellman and Hunt's.

A. Yes, sir. The price on the——

Q. On the shelf at the commissary store.

A. Yes, sir. I have that here. Well, it was 33 $\frac{1}{3}$ cents, Tru-Pak was 41, which is the brand we have surveyed here, and when we surveyed this commissary——

Q. Wait a minute, please. Just answer the question. Give me the prices for these three cans of pears.

A. I will give you four prices that we have. S&W is not one because they were not in. I will give you Libby, of which you asked the question. Libby pears on the commissary shelves were 37 cents, Sunblest pears were 39 cents, Tru-Pak pears were 41 cents, Wellman pears were 39 cents.

Q. What about Hunt's?

A. Hunt's price, our cost was \$6.90 at that time.

Q. For how many cans? [286]

A. Twenty-four cans.

Q. What was the price of Hunt's on the shelves at the time? A. Thirty-five cents, about.

Q. You do not know?

A. Thirty-four and $\frac{3}{4}$, because we were getting 34.3 at that time. They would have to be 35 cents.

Q. What was Del Monte brand pears?

A. Del Monte would not be listed but Del Monte—Libby's list is most always the same on everything. They vary very little in the industry.

(Testimony of L. W. Phillips.)

Q. They are below Hunt's?

A. They are above Hunt's in this case.

Q. In pears?

A. Yes, sir. They were at this time because this shows it.

Q. What time are you referring to?

A. At the time we made the survey in these prices that you asked me about.

Q. What time was that?

A. This was made in 1953.

Q. It was made when in 1953?

A. The early part of 1953.

Q. The early part of 1953?

A. I would say this was made in January, 1953, after the Navy contracts came out.

Q. Did you check the actual shelf prices in January of 1953 [287] at all these commissaries?

A. We checked them every month when I called. We saw the list and compared them.

Q. In January, 1953, you made this so-called survey. In the survey did you check the prices of all these brands on all the shelves?

A. The shelf is the thing I am talking about. When I say shelf, I mean checking the price.

Q. So your figure of 22 per cent difference referred to on your direct examination, that is based upon this January, 1953, survey?

A. No, oh, no. That is based on a continual survey over a period of time, and when we first took the line we had that survey.

(Testimony of L. W. Phillips.)

Q. Will you explain to me the mechanics of how you worked out the 22 per cent?

A. Yes, sir.

Q. Let us start with whether you took a survey from each month during the year 1952 plus January of 1953. Is that what you did?

A. No, no. We took the Navy commissary contracts for the quarter that were active and we made this check, which we picked up at the Navy Purchasing Office, of which we have copies here. We took the price off the Navy's commissary contract, and we found out what the Navy commissaries were [288] paying for the canned goods listed on that contract, and they had dozens of brands listed there for them to buy. We got Hunt's cost and knew the difference, and that is where we get our 22 per cent.

Q. And you compared the costs then with just the brands you mentioned on your direct testimony?

A. We compared at that time—the first time we compared everything we could find in the contracts. This list here is made up from another one that was in 1953, and the one which we talked about is in 1951, you see, but the price differential would remain practically the same all the time.

Q. How often does the Navy commissary contract issue?

A. Every three months.

Q. Every three months?

A. It is. These prices are static for three months.

Q. And your figure was based upon the prices

(Testimony of L. W. Phillips.)

that you obtained January, 1953, in that contract, is that it?

A. These prices that we have here?

Q. The prices on which you base your 22 per cent differential.

A. Both times, the first time and the last time.

Q. When was the first time?

A. About in August, 1951, and we sporadically checked up every three months after that.

Q. You mentioned both times. That is in August, 1951. The [289] next time is when?

A. Every quarter we would check it when it came out.

Q. I understood you to say this differential of 22 per cent—when I asked you what contract, you said both times? A. That is right.

Q. Both times; one was in August, 1951?

A. That is right.

Q. When is the other time?

A. In January, 1953.

Q. You took the August, 1951, contract. You worked out a comparison from that, didn't you?

A. That is right.

Q. How many brands did you consider in comparison?

A. The brands are on here. I think there are seven or eight of the heavy items and three or four of the others. They are on the list here.

Q. In January, 1953, you did the same?

A. Yes, sir.

Q. You had a result in 1951 and a result in 1953?

(Testimony of L. W. Phillips.)

A. We had results all the time. We were talking about those two dates before.

Q. You figured a percentage based on the 1951?

A. Did I figure it?

Q. Did you figure out a percentage differential based upon the 1951 contract? [290]

A. We took the line knowing that figure.

Q. Didn't you figure out, compute a differential in August, 1951, based on the prices in the Navy contract?

A. Yes, sir, and the commissary stores.

Q. Did you compute a differential based upon the January, 1953, Navy contract?

A. Yes, sir.

Q. Will you state what the differential was in the 1951 figures? A. About 22 per cent.

Q. And in 1953? A. About 22 per cent.

Q. It came out exactly the same?

A. It would do that.

Q. In working up that differential, how many items, how many products of Hunt's did you consider?

A. When we figured it out? We considered them all.

Q. All of them?

A. Yes, everything they had.

Q. All 100 plus items? A. Sir?

Q. All 100 plus items at Hunt's?

A. All they had. We took their price lists and figured it out.

(Testimony of L. W. Phillips.)

Q. You compared that price with these companies that you [291] mention?

A. Yes, sir, the price on the shelves of the items that we found.

The Court: If you would like to take the adjournment now, we shall. We will meet again at 2:00 o'clock.

(Whereupon, an adjournment was taken until 2:00 p.m. this date.) [292]

Wednesday, November 30, 1955—2:00 P.M.

The Clerk: Phillips versus Hunt Foods, Inc., further trial.

Mr. Rothert: Ready.

The Court: I'm sorry, gentlemen, there has been this delay in this case but you know how these lawyers get in some of these cases if you don't let them have their say in these cases. We will proceed and we won't take a recess this afternoon until 4:00 o'clock if that is agreeable to you gentlemen. I have a meeting of the judges at 4:00 o'clock and then tomorrow morning we will not be able to have a session because of another matter, so that if we do not finish this afternoon we will have to go over until tomorrow afternoon.

Mr. Cullinan: I have one request, your Honor. I was going to speak to Mr. Rothert, but we walked in in the middle of the Chessman case. I have one witness, who will be very short, not more than five minutes.

Mr. Rothert: I am willing to have any witness put on now.

The Court: Would you like to put him on now?

Mr. Cullinan: Well, he has to leave tonight so we could put him on at the end of the day.

The Court: You may get involved. If you want to be sure he gets away, put him on now. [293]

Mr. Cullinan: We will do that.

Mr. Rothert: Whatever Mr. Cullinan wishes to do.

HANS ERLANGER

called as a witness for the defendant, out of order; sworn.

The Clerk: Will you please state your name to the Court? A. Hans Erlanger.

The Clerk: Please spell your last name.

A. E-r-l-a-n-g-e-r.

Direct Examination

By Mr. Cullinan:

Q. Mr. Erlanger, will you state your position, your occupation?

A. I am an officer of Hunt Foods and in charge of sales.

Q. You are an officer of Hunt Foods?
Yes.

Q. And have you been since prior to 1951?

A. Yes.

Q. Mr. Erlanger, did you have any part in connection with the termination of the arrangement with Mr. Phillips in 1953? A. Yes.

(Testimony of Hans Erlanger.)

Q. And what was your part in that termination?

Mr. Rothert: Well, your Honor, of course anything he said or did outside of the plaintiff's presence would be hearsay, and I would object to any question, including this one, calling for hearsay evidence. I concede that he issued [294] instructions.

The Court: I think you will have to narrow your question.

Q. (By Mr. Cullinan): Mr. Erlanger, did you direct the termination of the arrangement with Mr. Phillips? A. Yes.

Q. For what reasons did you direct the termination of it?

Mr. Rothert: I will object upon the ground that it is calling for the witness' conclusion, it is self-serving on the part of the defendants, not binding on the plaintiff.

The Court: I think the objection is good, counsel.

Q. (By Mr. Cullinan): Mr. Erlanger, prior to April of 1953 had you had any reports from the credit manager of Hunt Foods on the standings of the Phillips account? A. Yes.

Q. And you were kept advised—you were advised of the status of that account? A. Yes.

Q. As a result of the information you had relating to the status of this account did you give any orders as an officer of Hunt Foods with respect to the arrangement with Mr. Phillips?

Mr. Rothert: I am going to object on the ground that it calls for the conclusion and opinion of the

(Testimony of Hans Erlanger.)

witness, it is leading and suggestive, and any orders he gave would be hearsay, would be self-serving on the part of the defendant. [295]

The Court: Sustained.

Q. (By Mr. Cullinan): Mr. Erlanger, as an officer of Hunt Foods do you know why the arrangement with Mr. Phillips was terminated?

Mr. Rothert: Objected to on the ground it calls for the conclusion and opinion of the witness.

Q. (By Mr. Cullinan): I am asking him what he knew.

The Court: I think this line of testimony is objectionable, counsel. It is of no moment that the witness thought about it or what his reasons were; the only thing that we are concerned with are the facts. What was the status of the account? Was the status of the account a breach of the contract or agreement to pay? Those are factual matters. It doesn't make any difference what anybody thinks about them or what orders he gave. The questions of fact you are entitled to bring out.

Q. (By Mr. Cullinan): Did you in April 1953, Mr. Erlanger, know whether the account of Mr. Phillips with Hunt Foods was in default?

Mr. Rothert: I am going to object to it on the ground that it calls for the witness' conclusion and opinion, incompetent, irrelevant and immaterial, in that the evidence as to the status of the account has been stipulated to, that is, that a certain amount of money was owed and unpaid.

The Court: I don't see the materiality of

(Testimony of Hans Erlanger.)

whether the [296] witness knew the status of the account or not.

Mr. Rothert: I will stipulate that of the amounts represented by the trade acceptances signed after termination, that most of that amount was unpaid as of the time of termination, without knowing the exact figures, but it was a substantial amount.

Q. (By Mr. Cullinan): And you knew that, Mr. Erlanger, in April of 1953, did you not?

Mr. Rothert: I will object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Cullinan: If your Honor please, this series of questions is obviously designed to show that an officer of Hunt's directed the termination because of the status of this account. The defendant is a corporation; it acts only through its officers. If this were an individual employer who took action, his testimony would be permissible.

The Court: But, you see, counsel, it doesn't make any difference what intramural decision was made on a matter unless the matter is communication to the other party. The officer of the corporation could meet with another officer of the corporation and have discussions with him and make any decision he wanted. It is of no moment unless that which was done is warranted in law or by the contract of the parties, and unless it is communicated to the other party what intramural [297] decisions were made. He might have made a decision that he was going to discontinue the contract because he didn't

(Testimony of Hans Erlanger.)

like this man's appearance, or because he didn't like his name, or because he didn't wear the right kind of clothes to suit the atmosphere of the concern. He could have made the decision for any number of reasons. An uncommunicated decision doesn't mean anything.

Mr. Cullinan: But Hunt's is being——

The Court: That would mean that he would be deciding the case. "I dismissed this man and I cut off his contract because he didn't pay his bills promptly." [298]

That doesn't mean anything to me. I don't care what his reasons are. Lawsuits aren't determined on such a basis as that.

Mr. Cullinan: Hunt's is being sued for a termination, an unwarranted one of an assumed contract. If Mr. Erlanger was doing business as an individual and he told one of his subordinates to cancel the contract, his reasons for doing so, even if only communicated from him to his assistants, would be pertinent to show whether the termination was justifiable or not.

The Court: I don't think the communication would determine whether the dismissal was justified or not. If the contract was one that provided that payments had to be made within a certain time and the evidence showed that payments weren't made within the time required, then the abrogation of the contract would be justified by the facts. It wouldn't make any difference what reason he gave or who he spoke to or what he did about it or

(Testimony of Hans Erlanger.)

whether he knew about it or not. All that had to be done was that the contract be abrogated and if the fact is that it was broken because of non-payment within the required time, then the dismissal is justified. It doesn't make any difference what he says about it; it is the facts that determine that matter. Those facts depend upon what the terms of the contract as to payment were and when the payments were made. [299]

Mr. Cullinan: Excuse us for a moment.

The Court: Certainly.

Mr. Cullinan: No questions.

Mr. Rothert: Your Honor, since Mr. Erlanger must leave this evening, I would like to ask him some questions as an adverse witness and ask leave to do so at this time. That will go beyond the scope of the direct.

The Court: What?

Mr. Rothert: The questions I have in mind are not within the scope of counsel's direct testimony so I am asking leave at this time to ask the witness a few questions as an adverse witness since it is necessary that he leave this evening.

Mr. Cullinan: I don't see that that is necessary or desirable, your Honor. Mr. Erlanger has not been under subpoena. We do have produced and have kept in the courtroom other witnesses that Mr. Rothert has asked us to produce. I don't think that because Mr. Erlanger was here and is leaving that he should be now interrogated.

The Court: Well, now, of course, he is here and

(Testimony of Hans Erlanger.)

I think that either counsel can always interrogate a witness that is here.

Mr. Rothert: Having him here——

The Court: That applies to both sides. Have you any extensive examination? [300]

Mr. Rothert: No, your Honor.

The Court: All right. Go ahead.

HANS ERLANGER

called as a witness on behalf of plaintiffs as an adverse witness; previously sworn.

Direct Examination

By Mr. Rothert:

Q. Mr. Erlanger, are you the representative of Hunt Foods who made certain arrangements with Francois L. Schwarz Company in 1953?

A. Yes.

Q. Did you prior to the end of April 1953, tell Mr. Lee Miller that you had made arrangements with Francois L. Schwarz, Inc., to handle the sale of the Hunt products to military bases on a world-wide basis? A. That's correct.

Q. And did you tell him that that would necessitate terminating Mr. Phillips' arrangement for selling to military bases in Northern California?

A. Yes.

Mr. Rothert: No further questions.

(Testimony of Hans Erlanger.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Erlanger, what was the reason for making arrangements with Schwarz?

Mr. Rothert: I will object on the ground it calls for the conclusion and opinion of the witness and is incompetent, [301] irrelevant and immaterial. The questions I have asked I submit are in the nature of an admission against interest.

Mr. Cullinan: I am certainly entitled to examine on the basis of the last question that Mr. Rothert asked as to what reasons——

The Court: I think that the examination would be limited to the conversation, that is all. All that counsel asked was whether or not this witness made a statement in a conversation.

Mr. Cullinan: Yes. Would you read the last question of Mr. Rothert's, please?

(Record read as requested.)

Q. (By Mr. Cullinan): Did you at that conversation tell Mr. Miller what the reasons for terminating or for employment of Schwarz?

Mr. Rothert: Objected to on the ground that it is hearsay.

Mr. Cullinan: We are entitled to the whole conversation, your Honor.

Mr. Rothert: Hearsay, incompetent, irrelevant and immaterial.

(Testimony of Hans Erlanger.)

Mr. Cullinan: We are entitled to get the whole conversation.

The Court: Your question was did he tell him.

Mr. Rothert: I think that question really should be [302] considered in connection with the previous one because in the previous one he said he told Mr. Miller that he had made arrangements with Francois L. Schwarz Company to handle sales to all military bases on a world-wide basis.

The Court: You have opened up a conversation now. He is entitled to inquire as to the conversation on that subject. I will overrule the objection.

Q. (By Mr. Cullinan): Will you tell us what you told Mr. Miller at that time?

A. Mr. Miller came into my office——

The Court: No. Just say what you told Mr. Miller.

A. I told——

The Court: Without anything else. Just what the conversation was.

A. This conversation took place that Mr. Miller told me.

Mr. Rothert: I am going to object, your Honor——

The Witness: That Mr. Phillips wanted——

The Court: No; the question was, State what you told Mr. Miller.

Q. (By Mr. Cullinan): What you told Mr. Miller with respect to the reasons for terminating—I mean for making the——

(Testimony of Hans Erlanger.)

The Court: Mr. Erlanger, you just state what you said to Mr. Miller.

A. I told Mr. Miller that at the brokers and canners' convention in Chicago I had a discussion with Francois L. [303] Schwarz Company regarding taking over the military business on a world-wide basis; that I felt that this company could be most beneficial to Hunt; and that due to the fact that we don't get enough business out of Northern California and at the same time Mr. Phillips doesn't take care of his financial commitments, that I would like to terminate the connection with Mr. Phillips.

Mr. Cullinan: That is all.

Mr. Rothert: I have a couple more questions, your Honor.

The Court: You say you have one more question?

Mr. Rothert: I do, yes. I am just finishing my notes.

Redirect Examination

By Mr. Rothert:

Q. When was it that you talked to the Schwarz Company at the brokers' and canners' convention?

A. I believe the brokers' and canners' convention took place the end of February of that year.

Q. Of 1953? A. Yes.

Q. And when was it that you had this talk with Mr. Miller? I think my question merely was was it before the end of April. Can you tell us any more exactly when it was?

A. I couldn't tell you the exact date.

(Testimony of Hans Erlanger.)

Q. Can you tell us what month it was in?

A. To the best of my knowledge, I believe it was the end of March or the beginning of April. [304]

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

The Witness: Thank you.

The Court: Now you wish to continue with the cross-examination of Mr. Phillips?

Mr. Cullinan: Yes. [305]

L. W. PHILLIPS

resumed the stand; previously sworn.

Cross-Examination

(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, in your determination of the differentials between the Hunt Prices and the prices of these other companies on the shelves, did you take an average of the prices of, say, S&W and then take an average of the prices of Hunt's?

A. No. You are talking of an average of all items together?

Q. Yes.

A. No; each separate item by itself.

Q. You took each separate item and then you took an average of, let's say, pears, for instance, S&W has X price for pears and Y price and you compared those prices, took an average of those prices on pears?

(Testimony of L. W. Phillips.)

A. It would have been S&W or any other brand I found in there, yes, sir.

Q. And then you would do the same thing for tomatoes? A. Yes, sir.

Q. Take an average of the price of tomatoes, let's say tomato paste? A. Yes, sir.

Q. And then you would take an average of the price of fruit cocktail?

A. That's right, sir. [306]

Q. And then you would take an average of one kind of pears—the terminology I am not familiar with—we will say a fancy kind of pear or a sliced pear or there is a half pear?

A. I believe there is, yes.

Q. You would take, for instance, one kind of pears and compare S&W prices on that with Hunt's prices on that and then figure the average of that type of—

A. Figure the percentages that could be gained, yes, sir.

Q. And then when you had your list all made up—or did you make a list up? A. Oh, yes.

Q. Do you have that list? A. Oh, yes.

Q. Then when you made the list up, how did you work out the average profit of 22 per cent?

A. Yes, sir.

Mr. Rothert: Not profit.

The Witness: Gross.

Mr. Rothert: Differential.

The Witness: Differential.

Mr. Cullinan: Differential.

A. It was worked out on the basis of my knowl-

(Testimony of L. W. Phillips.)

edge of the sale of canned goods over 20 years of watching it.

Q. Wait a minute; excuse me. I want to know when you had this all down on the sheet, then what did you do? Did you add [307] up the columns on one side and the columns on the other?

A. No, no.

Q. What did you do?

A. That wouldn't be the right way to do it. I took the average sales of each item as they were that I had received in the commissary stores—they told me how much they were buying of any item—and I computed the profits extended on each item across, and then added up the difference, and that was the figure I used.

Q. I am talking about the differential of Hunt's price and the price of these competitors on the shelves.

A. Yes, sir. May I explain it a little further for you?

Q. Wait a second. You worked out these figures item by item? A. That's right.

Q. The percentage of differential item by item?

A. How each item sold about, yes, sir.

Q. Now, when you had that total all made up for each item, did you then add the percentages in one column and add the percentages in the other and divide? A. No.

Q. What did you do?

A. We took what you would call a trial order and we projected the profits on the trial order using

(Testimony of L. W. Phillips.)

items we knew of Hunt's and items of the other brands, according to how much was [308] sold. In other words, if a base told me, "I buy 20 cases of ketchup, 20 cases of this, 10 cases of something else, 5 of something else and 3 cases of something else," I extended all those prices out by Hunt's cost and brought that invoice down, because that was the way they bought the items. Then I took the same cases of another brand that we were comparing with and did the same thing and brought it down, and the totals together was the correct percentage.

Q. So you made assumptions that if five cases of S&W paste was bought they will sell for so much, and then made a similar assumption for Hunt's?

A. It wasn't an assumption; it was what they told us, and after that figure, knowing that it was easy to figure; if you have got both costs or both selling prices it is very simple.

Q. Were your comparisons, say, on tomato paste a number of cases from S&W compared with a number of cases from Hunt's? Did you assume the same amount of cases of each company's produce?

A. For each?

Q. Yes.

A. Yes, sir, of each item; oh, yes.

Q. Do you have that sheet?

A. We have this sheet here is the prices.

Q. I am asking you, are these papers that you have there the papers from which you worked out the 22 per cent? [309]

(Testimony of L. W. Phillips.)

A. No; that was in '51.

Q. You do not have the papers that you worked out the 22 per cent differential on?

A. No; I have the price papers only here, not the 22 per cent differential.

Q. Let me take a look at these.

A. Sure.

Q. Then you didn't give any weight to the volume of a particular product at a particular commissary?

A. What they told me. We could only take what they said, what their records showed; that's all we had to go on.

Q. But you compared equal volumes as between one competitor and Hunt's, did you not?

A. Sir?

Q. You compared equal volumes as between Hunt's and some other competitor of Hunt's?

A. That's right. Oh, yes.

Q. So that the actual volume that Hunt's might have done or S&W might have done was not a factor in your computation?

A. The only factor was that Hunt's would have been more due to their label—due to the advertising factor they would have done more business.

Q. In other words, you didn't take into account the volume in any particular company's price?

A. Oh, yes; we knew the volume that they were selling of [310] every brand.

Q. But you didn't take it into consideration; you

(Testimony of L. W. Phillips.)

used an assumption of an equal amount of each company's products?

A. According to the number of items they were allowed to carry, yes, sir.

Q. How would you compare, for instance—let me state, some packers use a 303 can, don't they?

A. That's right.

Q. And Hunt's is a 300 can?

A. That's right.

Q. How did you compare prices on an S&W 303 can and Hunt's 300 can? Let me also ask, isn't it a fact that the 303 can is 17 ounce and the 300 about 15?

A. 15½, a difference of about 10 per cent. We adjusted the figure down to compare favorably.

Q. You adjusted the figure down?

A. Fortunately S&W I don't believe at that time—I don't remember the fact, but wherever there was a difference in the price which Hunt had, they had this 300 tall, an off size, we knew about that; we had to watch that item, we knew we had to watch that and get under the 303 other one on which we figured.

Q. You can't compare five cases of S&W 303 cans with five cases of Hunt's 300?

A. One is 24, the other is 48. That is the difference. [311] But you can compare by dozens.

Q. But the volume, the content is quite different, isn't it? A. Not so much different.

Q. One is 17 ounces, the other is 15 ounces?

(Testimony of L. W. Phillips.)

A. Hunt has done a wonderful job with the item.

Q. We will stipulate to that. A. Yes.

Q. What I am getting at is you can't compare the price of a case of 303 cans with that of a 300 can because you have more ounces of the product in the case of 303 cans?

A. We used the sale of 303. We knew 300 would be larger. We knew it would be more, so we were using a lower figure all the time to assume those factors. You had to. You couldn't take a chance of going over. You had to get under.

Q. So in working out your 22 per cent you did then compare the price of a case of 303 cans with the price of the cases of 300?

A. No, not prices. The differential showed in the case. If there were a smaller can, we showed a smaller can. They had a picnic can in the same position. You had to watch the ounce content to sell it.

Q. Leaving that for a moment, on the question of the markup that you might have gradually made on articles that you sold to the commissaries, Hunt sells to chain stores and to [312] wholesalers at about the same cost it sold to you?

A. That is right.

Q. If you raised your prices to the commissaries, you would have to watch, wouldn't you, that you didn't raise them so that the commissary price would be higher than the chain store or a super market down the street, wouldn't you?

(Testimony of L. W. Phillips.)

A. That is right.

Q. Your markup possibilities were qualified by the fact that you could not mark it up to an extent where it would not compete with the price down the street of the super market or the chain store?

A. Yes, we paid for the survey we got every month to figure that out.

Q. That is one limitation on whatever markup you would take.

Mr. Rothert: Is that a question?

Mr. Cullinan: He answered my question.

Q. Now, Hunt's—

A. You asked the question, was that a limitation on any markup that we might have?

Q. No; you have answered my previous question. I am asking you this question now: Hunt's had jobbers selling canned goods, didn't they?

A. Very sporadically because they were a direct seller to the chain and super markets.

Q. There was nothing to stop a jobber of Hunt's from going [313] to the commissaries to sell, was there? A. How is that again?

Q. There was nothing to stop the jobbers of Hunt's from going to the same commissaries you were dealing with? A. Not a bit except—

Mr. Rothert: Just a minute. I am going to object on the ground it is ambiguous. It calls for a legal conclusion. We understand that Mr. Phillips' arrangement was exclusive.

Mr. Cullinan: Yes; I am not talking about Hunt's.

(Testimony of L. W. Phillips.)

Q. Let me ask you this: Jobbers were free on their own to come to commissary stores to sell Hunt products to commissaries?

A. Not according to Hunt's agreement with us.

Q. Is there anything in that bulletin—well, I will withdraw that. I am not talking about Hunt's sending the jobber in.

A. You are talking about a jobber?

Q. I am talking about a jobber that decides to compete with you.

A. Hunt told us when we took it, if they found a jobber trying to sell a commissary store, they would ask him to stop it.

Q. They would ask him to stop it?

A. Yes, sir.

Q. When was that said? [314]

A. That means he would stop it.

Q. When was that said?

A. At the time that I met with Mr. Flynn.

Q. Mr. Flynn said that to you?

A. I don't remember if it was said there or not, but it was said somewhere in our conversations that we would be protected in our jobs with the commissaries.

Q. You do not remember whether it was stated at the meeting with Mr. Flynn or not?

A. I don't remember that, no, but it was in the conversation. It was broadcast rather extensively.

Q. So some time when you were dealing with Hunt's somebody at Hunt's told you if the jobbers started to compete they would ask them to stop?

(Testimony of L. W. Phillips.)

A. They told me that, yes. We didn't have any trouble.

The Court: I don't see the materiality of this.

Mr. Cullinan: I am getting down to what freedom he would have in his markup at the commissaries.

The Court: Yes, I understand what you are getting at. It seems to me it is purely a hypothetical subject.

Q. (By Mr. Cullinan): Mr. Phillips, in your sales to the commissaries, it was your plan, wasn't it, to have the Hunt products priced on the shelves between the high price and the low price items?

A. It was my plan? [315]

Q. Yes.

A. It was my plan to watch competition in a commissary store.

Q. But your shelf structure—let us use the term—was that you wanted the Hunt product wherever you could to be right between or at least between the higher priced canned goods and the lower priced canned goods?

A. You mean that was our policy?

Q. Wasn't that your policy?

A. Our policy was to watch the competition, and we took as much as we could take.

Q. In watching your competition you tried to keep the Hunt products in between the high priced products and the low priced products, didn't you?

A. We tried to protect the label to be sure it

(Testimony of L. W. Phillips.)

was sold. That sometimes didn't mean what you are saying.

Q. Wasn't it your plan, and didn't you work it out that way, that the Hunt products were generally in between in price the more expensive and the less expensive of the same products?

A. On some items that was possible.

Q. That was your plan for as many items as you could do it with?

A. Sure, naturally it would be in order to get the business, sure. [316]

Q. And you did that with a number of Hunt items, didn't you?

A. We sold lots of odd items at a very low figure to get started and because their prices were obsolete, but we also moved items up.

Mr. Cullinan: Will you read the question?

(The last question was read.)

Q. (By Mr. Cullinan): Answer that question.

A. What did I say?

Mr. Cullinan: I move to strike the answer as not responsive.

The Witness: Ask the question again.

Mr. Rothert: You will have to go back to the last question.

Mr. Cullinan: Very well.

Mr. Rothert: I think the reference to the word "that" may have been obscure. You did "that" with a number of items. What does that mean now?

Q. (By Mr. Cullinan): You succeeded, did you

(Testimony of L. W. Phillips.)

not, Mr. Phillips, in placing as many commissaries and placing Hunt's items in at a price bracket which was between the high and the low priced brackets for the same commodity?

Mr. Rothert: You mean the competitors?

Mr. Cullinan: The competitors.

The Witness: We succeeded in placing them under new—the first time? [317]

Mr. Cullinan: May I ask that the question be read?

(Question read.)

A. Yes.

Q. (By Mr. Cullinan): Wherever that was done, you were limited on the markups that you could make on that Hunt product because you would push it into the higher bracket, competing with the higher bracket, wouldn't you?

A. I don't understand the question.

Q. Where you have Hunt's below the higher priced merchandise, the same commodity——

A. That is right.

Q. ——there you are limited in the amount of markup?

A. No, you would move up there if you had a volume.

Q. Do you mean you would price yourself into competition with the highest priced products?

Mr. Rothert: You gave an example in which only the highest priced product was mentioned.

Mr. Cullinan: Well, the next highest.

(Testimony of L. W. Phillips.)

Mr. Rothert: What I am getting at, if I can say it succinctly, is this:

Q. You are limited, are you not, where you are limited, the high priced labels, were your prices under the high priced labels, you are limited competitively in the amount of markup you can make on the Hunt product lest you move it over to the bracket of the brackets of higher price? [318]

A. I would have to understand what you mean by "under." Use an example and I will tell you what was done.

Q. Suppose you are a few cents under, let us say, S&W. A. Items, please? Pears?

Q. Say pears.

A. All right. When you say a few cents, you mean how many?

Q. Three cents. A. Three. All right.

Q. Where there is that much of a spread you are limited as to how much you can increase the Hunt price because if you increase it a couple of cents, two or three cents, whatever the example was, you would be in the same price bracket?

A. That is right, and we would not do that.

Q. You would not do it?

A. Didn't want to do it. We moved from one cent to two, maybe two cents to one, but we would have watched it pretty closely.

Q. You testified as to your costs, I think the purchase price of goods sold to Alameda Air Station. Is that the figure of \$10,806.07—would that be the gross price less discount?

(Testimony of L. W. Phillips.)

A. You mean—I took the invoices that were paid on face. There was no discount on them.

Q. You took the face of the invoice?

A. Yes, sir.

Q. You did not allow for any discounts in this figure of [319] \$10,806? A. No.

Q. In your percentage of profit that you estimated on the Alameda Air Station summary, that percentage of profit would depend upon what items were sold, wouldn't it? What kind of items were sold?

A. Well, if you had—no. How would the percentage depend upon what kind of items were sold?

Q. Which items? A. Yes, sure.

Q. Because of the spread difference in some item? A. That is right.

Q. And the spread differs from item to item.

A. You mean the profit on one item is greater or smaller than another? The markup?

Q. That is right.

A. That is the policy in the wholesale business.

Q. The percentage of profit depends upon what item was sold at a particular time to a particular commissary?

A. That was our business to watch that, yes.

Q. And your profit, too, during the period of time varies according to competition, doesn't it?

A. How is that again?

Q. Your profit, the amount of your profit varies according to competition. If the others come down,

(Testimony of L. W. Phillips.)

you have to come [320] down in your price, don't you?

A. You are talking about the people who are in the commissary store?

Q. No, I am not talking about your prices to the commissary stores.

A. That would apply in anything, yes, sure. If they went way down, we would have to go way down.

Q. Your profit varies, therefore, from time to time according to the state of the competition that you are experiencing?

A. Yes, sir, but these people that I was in competition with were very careful and watched the commissary prices and kept them up, because they had to watch the super markets, trying to sell them, too. If they sold the commissaries too cheap and the super markets found out—they had probably 8,000 super markets to work against 19 commissaries—no jobber would cut the price to commissary stores. He would be foolish.

Q. Some time at the start of your arrangement with Hunt's you sold at cost or less in order to get the item into the commissary, didn't you?

A. No, not in order to get it in. They were posted by Hunt's sales force.

Q. Didn't you have a controversy at one time with Mr. Denison about moving into the commissary in the early days of your dealing with [321] Hunt's? A. Commissary?

(Testimony of L. W. Phillips.)

Q. A controversy with Denison for selling at less than the cost of goods to you?

A. Yes, but we never sold anything at less than cost. On ketchup, are you talking about?

Q. Yes.

A. No, we never sold ketchup below cost. We came down at one time from a particular good profit to beat Denison, but we still sold above cost. We still made a profit.

Q. Mr. Phillips, you have testified that in 1952 your gross on Hunt's business was some \$94,000, I think you said.

A. We show that on the billing. The cost would have been less, because whatever we paid, the difference between our billing and the cost would be our little profit that we made.

Q. So the \$94,000 is your gross sales from Hunt's products?

A. Yes, sir.

Q. That was in the year 1952?

A. Yes, sir.

Q. Your 1952 income tax return shows gross receipts from business of \$347,175.11?

A. That is right.

Q. So the excess over the \$94,000 was in other business?

A. Bidding.

Q. Bidding business?

A. Yes, sir. [322]

Q. And the brokerage?

A. Well, the brokerage wouldn't show there. The brokerage doesn't show up in our sales. The sales wouldn't show in the brokerage, I don't believe. Correctly it should not.

(Testimony of L. W. Phillips.)

Q. The 1952 income tax return shows other income, commissions earned, \$3,906.15. Is that brokerage? A. That is brokerage, yes.

Q. That figure is larger than the 1951 brokerage commissions, isn't it?

A. Well, the brokerage, because we had a man working in the brokerage business at that time, yes, sir.

Q. In other words, in 1952 your brokerage income was substantially larger than it was in 1951?

A. Not only substantial, if I remember, we didn't have any in 1951, because we were not in the brokerage business. We hired an employee to handle it in 1952.

Mr. Cullinan: May we have the 1951 income tax return just to refresh his memory?

The Witness: That is all right. I don't remember any brokerage. There may have been.

Q. (By Mr. Cullinan): Mr. Phillips, my notes I took from your records show commissions earned in 1951, \$2,773.43.

A. I didn't remember it. It might have been possible.

Q. Would that refresh your recollection?

A. I don't know how we earned it. That probably wasn't it. [323]

Q. Let me just ask you these questions, Mr. Phillips. This summary or notes that you gave me a little while ago on one page entitled "Average selling prices for items commonly carried in the commissary store in Northern California," it says

(Testimony of L. W. Phillips.)

that means "all other items"? A. Yes.

Q. Then you have apricots, blackberries and other items listed. A. We have.

Q. Case cost at time of survey, lowest competition—that is the case cost? A. That is right.

Q. And then Hunt's cost?

A. That is right.

Q. How did that show any difference where a case may be of 300 cans or a case of 303 cans?

A. I don't believe—if I am correct on that list—in other words, if they had 24, we would have 48.

Q. I am asking you how do you compare a case cost of 300 cans with Hunt's cost of 303 cans?

A. We reduced the price of the 303 cans immediately. We would have to.

Q. You do not show any working out of that?

A. No, that is just a rough figure.

Q. And that is the figure that you used when you were [324] testifying? A. No.

Q. I mean this is the basis.

A. No, that is not the basis.

Q. This is why I had this in my hand.

A. No, I was adding it up myself.

Q. This total and this total you have subtracted?

A. That is right.

Q. Does that give you the percentage of your profit? A. No.

The Court: I do not know what you are getting at when you say "this total and that total."

Mr. Cullinan: I do not understand what this is, your Honor. I was trying to find out what it was.

(Testimony of L. W. Phillips.)

The Court: It is not in evidence.

Mr. Cullinan: That is all, your Honor.

Mr. Rothert: I have three or four questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. You were asked whether the markup you could get on selling Hunt's products was qualified or limited by the sales by Hunt's to the general stores. I would like to ask you to what extent would that factor be a limitation on your markup?

A. The commissary stores, if they were selling something higher than a chain on a shelf, the same brand, we might have to [325] watch it, but we could move up to that figure.

Q. What was the comparison of the price at which Hunt's would sell to chain stores and the price at which Hunt's could sell to you?

A. Approximately the same as on a jobbing basis. If they bought a car it might save a nickel a case or something, but it was about the same.

Q. Were the Hunt's products sales in super markets and chain stores any different than the jobbing prices from Hunt's?

A. Do you mean—you mean the selling price?

Q. Yes. A. Oh, yes, quite a bit.

Q. What accounts for that difference? What is that difference?

A. The markup that the super market would take in his retail operation.

(Testimony of L. W. Phillips.)

Q. To what extent; that is, by how much of a limitation was it caused by the prices of Hunt's products on sale in the chain stores to you in your business selling to the commissary stores?

A. How much the different was between my cost and what the super markets sold it for? Is that what you mean? The difference between my cost and the super market?

Q. My question is how much of a markup could you place on the Hunt's prices to you until you got to the point where you [326] had trouble because it equalled the chain store selling prices?

A. About 22½ per cent. We had a survey on it there. That is in the record.

Q. The competing lines such as S&W, Tru-Pak and Monarch that you mentioned, that you found being sold in the commissary stores—were those lines handled by jobbers?

A. They were handled by private label jobbers that took an excessive markup on private label, which is the common practice.

Q. Was the markup or profit that you attempted to get on the sale of Hunt's products corresponding to the jobbing markup on the sale of competing lines by jobbers? A. Private label jobbers?

Q. Yes. A. Yes, sir.

Q. And about the markup that the chain store operator placed on the prices after he bought them?

A. Yes, sir.

Q. You testified to gross profit from sales, actual sales to Alameda Air Station commissary in 12

(Testimony of L. W. Phillips.)

months. Was that gross profit computed by subtracting the cost of the merchandise from the total that you sold it for? A. Yes, sir.

Q. And in stating the percentage, is that the approximate percentage of the gross profit compared to what you paid for [327] that merchandise?

A. No, sir, based upon that selling price, not the cost.

Q. All right, the selling price. A. Yes, sir.

Q. Does it make any particular difference what particular items were sold during that 12 months in order to determine the percentage of gross profit?

A. No; the dealers are there anyway.

Q. You said the figure of \$347,000 in your 1952 tax return of income included your sales of Hunt products plus your other bidding business?

A. Yes, sir.

Q. That would include the money paid by the Government on bids that were accepted and billed?

A. That is right.

Q. On the expense side of the same year's profit and loss statement, both the costs that you had paid Hunt's for their items and the costs that you paid for buying merchandise on bids to the Government?

A. Yes.

Q. Is some of the Government bidding business done on a quarterly basis? A. Yes, sir.

Q. For a quarter starting on the first of January, when are the bids made and accepted? Before or after the first of [328] January?

(Testimony of L. W. Phillips.)

A. They are made as a rule about the middle of November. You get your forms in December and you start delivering in January.

Q. For the first quarter of 1952—the bidding business for the first quarter of 1952, would that reflect bids made before the end of the year 1951?

A. To some extent, yes, sir.

Q. You were asked a question about having to do with higher and lower prices on competing items in commissary stores and what the plan was. Will you state just what your plan was in pricing the Hunt products when you made the sales to the commissary stores, having in mind then the price, what the competition was?

A. Well, as I stated before, if we started in with a new item—are you talking about the placement of an item?

The Court: I think this has been testified to already. I see no particular point in going over it again.

Mr. Rothert: I have an idea that the witness may have misunderstood some of those questions and got a little confused. I may be the one that is confused, your Honor.

The Court: I do not think it is a particularly confusing subject. It is very evident what the witness was endeavoring to do. He was trying to market these commodities. I do not think there is anything very difficult about it. [329]

Mr. Rothert: I have no further questions.

(Testimony of L. W. Phillips.)

The Court: He tried to meet the competition and make a little money for himself.

Recross-Examination

By Mr. Cullinan:

Q. I have just one more question: Did I understand your testimony, Mr. Phillips, to be that you could mark up products 22½ per cent and still be competitive with the chain stores?

A. On Hunt's canned food goods?

Q. Yes.

A. Our books show that we could and we did.

Q. I just wanted to get that clear. That is your testimony, that you could mark up the Hunt products 22½ per cent over what you got it for and still compete with the same Hunt products in the chain stores?

A. Yes, that is right. But you understand that many chains did not carry Hunt's products. We had it at our discretion to pick any brand we found and come up to it and make our profit that way. We had no profit trouble.

Mr. Cullinan: The question has been answered.

Mr. Rothert: Yes. I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Rothert: I will call Mr. Mears, your [330] Honor.

DAVID L. MEARS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you please state your name to the Court?

A. David L. Mears.

Direct Examination

By Mr. Rothert:

Q. Where do you live, Mr. Mears?

A. I live at 25 Diaz Avenue.

Q. What is your business?

A. Division sales manager, Blue Star Foods.

Q. Are you acquainted with Mr. Wellington Phillips?

A. Yes, I am.

Q. Did you at one time work for him or with him?

A. Yes, I did.

Q. Did you know Mr. Phillips in 1951?

A. Yes.

Q. Was there any occasion when you were present when Mr. Phillips had a discussion with Mr. Flynn of the Hunt Foods Company?

A. Yes.

Q. When did that conversation take place?

A. Some time in the fall of 1951.

Q. At the time of this conversation were you working for Mr. Phillips?

A. No, I was not. [331]

Q. Where did this conversation take place?

A. Took place in their offices in Hayward, in Hunt Foods.

Q. How did you happen to be there when Mr. Phillips was there in Mr. Flynn's office?

(Testimony of David L. Mears.)

A. At that time we were perhaps going into a dented can business, the sale of dented merchandise to the restaurant trade here and around the Bay Area.

Q. Did you meet Mr. Phillips there or did you go with him? A. No, I went with him.

Q. At that time did you have anything to do with Mr. Phillips' business?

A. No, I did not.

Q. Was there anyone else present in the conversation besides yourself, Mr. Phillips and Mr. Flynn?

A. I think Mr. Ed Seiger was there on occasion.

Q. Will you explain what you mean by "on occasion"?

A. I think he came in and out of the business a couple of minutes at a time, two or three minutes at a time.

Q. While you were there was this dented can business discussed?

A. Discussed between Mr. Flynn and myself?

Q. Yes. A. Yes.

Q. While you were there was there any discussion between Mr. Phillips and Mr. Flynn about Mr. Phillips' business? [332] A. Yes.

Q. Will you tell the Court what you recall about the conversation you overheard between Mr. Flynn and Mr. Phillips about Mr. Phillips' business?

A. Well, at that time Mr. Phillips was sole owner of this company——

(Testimony of David L. Mears.)

The Court: No, just relate what the conversation was.

A. Oh, just that the conversation was Mr. Phillips was interested in the selling of canned goods to the commissary bases, and the sale of Hunt Foods in particular, Hunt canned goods to the commissary bases, and at that time I believe Hunt salesmen were calling frequently upon the commissaries, but the volume of sales was not as extensive as it might have been, and as Mr. Phillips' business is primarily dealing with the Army and Navy installations, it was felt that the volume of business could be considerably improved.

The Court: Are you stating now what somebody said there or is this just your conclusion as to the nature of Mr. Phillips' business with the Hunt Company?

A. The conversation was, sir, that the business could be improved by the use of Mr. Phillips, with the use of Mr. Phillips' services, yes, sir, and I believe somewhere in the conversation the question of a point system, which Hunt salesmen were working on at that time, was brought up, and that, although Mr. Phillips was selling directly to [333] the commissaries, the particular salesman would still receive credit for the sale within his territory. Basically that was the gist of the conversation at that time.

Q. I want you to think if you can think of anything else that was said in the conversation about anything at all.

(Testimony of David L. Mears.)

A. I think during the conversation it was mentioned that Mr. Phillips would have to sell at approximately the same prices or at the same prices that Hunt salesmen were currently selling to the commissary stores, and that they would have to remain at that price for a relative period. It was quite obvious that you could not go into a commissary and immediately raise the prices just because someone else had taken the line over.

Q. Was there anything else said in that connection?

A. I believe the conversation did take place between Mr. Flynn and Mr. Phillips to the effect that it would be—Mr. Phillips would have to sell at approximately the same prices that Hunt Foods were selling at at that time and a small differential between his costs and the sales price would mean that he would have to be selling at approximately or at his costs or at a slight profit. This would have to continue for a period of one or two years, and then following that time another relative period in which he could gradually take a markup to recover some of the losses, show a profit, or break even during that particular period. [334]

Q. Who was it that made the statement you just made in the conversation, if you remember?

A. I believe it was just a general discussion that took place between the two men.

Q. Do you recall whether or not the subject that Mr. Phillips——

Mr. Cullinan: Just a minute, now, if your Honor

(Testimony of David L. Mears.)

please. I object to counsel leading the witness to what else was said there to ask him for the conversation.

Mr. Rothert: I think it is not objectionable in mentioning the subject of possible conversation.

The Court: I can't tell whether it is leading until the question is asked. Complete the question.

Q. (By Mr. Rothert): Do you recall, Mr. Mears, whether or not the subject of Mr. Phillips' existing business that he had at that time was mentioned in the conversation?

Mr. Cullinan: I will object, if your Honor please, to the leading of the witness.

The Court: I do not know how it can be leading unless you put the answer in the mouth of the witness in some way. I know attorneys always make that objection, that a question is leading. The attention of the witness is directed to a subject matter. I do not know how it would be leading in the sense that it suggests an answer to the witness.

Mr. Cullinan: I should say, your Honor, my objection is [335] that the question is leading and suggestive.

The Court: He is asking him whether a certain subject was discussed. The witness can answer yes or no to that. But if you ask the witness did you say thus-and-so in the conversation, then you put something into his mouth and it is a little different. But I have heard this so many times, I do not attach credence to it. You ask a witness to state a conversation and he gets up on the witness stand—

(Testimony of David L. Mears.)

and maybe he doesn't remember everything at the moment—and you have to prod him a little bit. As long as you do not put words in his mouth and you direct his attention to a general subject matter, I do not see any harm. I never believed the only question you could ask him is was there anything else said. I will overrule the objection.

Mr. Rothert: Will you answer that, Mr. Mears?

(Question read.)

A. Yes, it was.

Q. (By Mr. Rothert): What do you recall was said on that subject?

A. Oh, basically, that Mr. Phillips was doing, I think, primarily a bidding business at that time and it would take considerable——

Mr. Cullinan: Excuse me, your Honor. May we have the witness tell who said what?

Q. (By Mr. Rothert): If you can, identify the person who said [336] whatever you are stating was said.

A. That is a little difficult at this time, your Honor, five or six years later.

The Court: You do not remember who said what?

A. No, sir.

The Court: Well, finish the answer.

A. That Mr. Phillips was doing primarily a bidding business at that time, that he would have to spend a considerable amount of time in calling on the commissaries, talking to the commissary

(Testimony of David L. Mears.)

officers, certainly a time-involving proposition, and that as a result, why, the business that he had at the time would either suffer—due to the amount of time involved in calling upon the commissaries.

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Mears, to the best of your recollection have you told us the whole conversation and all subjects that were discussed at that meeting?

A. Well, this took place over a series of meetings, two or three.

Q. This is not a particular one meeting?

A. What I am relating is the gist of a couple of conversations, yes.

Q. How many conversations, do you know?

A. I think I was present on either two or [337] three.

Q. Can you tell us approximately when those two or three conversations were?

A. Some time in the fall of 1951.

Q. So none of the matters that you have mentioned can be pin pointed to any particular meeting?

A. Principally, yes.

Q. Which meeting would that be? The first time, second time——

A. I mean that would be difficult to tell at this time.

Q. Was Mr. Steiger present at most of those

(Testimony of David L. Mears.)

meetings? A. No, I don't think he was.

Q. It is the usual practice, is it not, for a jobber to sell at low prices at the start when he is starting out with a product?

The Court: That is pretty general, counsel.

Q. (By Mr. Cullinan): Is it the custom and usage in the industry with respect to the appointments of jobbers how long they are appointed to act?

Mr. Rothert: I will object to that. It calls for the witness' conclusion and opinion.

The Court: It is not part of the direct examination. The witness is only asked as to a conversation he heard, counsel, unless you make him your witness for some other purpose. [338]

Q. (By Mr. Cullinan): Was Mr. Phillips told in your presence during your conversations that he was appointed a jobber to act for Hunt's or did you hear that later?

A. Would you mind repeating that again?

Q. At any of these meetings when Mr. Flynn was present and you were present, was Mr. Phillips told by Mr. Flynn that he would be a jobber for Hunt's or did you learn of it later?

A. No, I think it received his approval.

Q. Flynn's approval?

A. Flynn's approval, yes.

Q. In your presence? A. Yes.

Q. Do you remember anything that Mr. Flynn said about the appointment as a jobber at that meeting?

(Testimony of David L. Mears.)

A. Do you mean do I remember him saying something to Mr. Phillips that "you are hereby appointed a jobber"?

Q. Yes.

A. Well, these things are just not said. It is an accumulation. It is an assumed fact after a conversation.

Q. You have talked to Mr. Phillips, have you not, Mr. Mears, in the last year or so about this litigation, or, rather, Mr. Phillips has talked to you on occasions, hasn't he?

A. We have discussed it, yes.

Q. And in those conversations with him he has mentioned, has he not, in those conversations that he was going about, [339] when he started with Hunt's, he knew he was going to suffer for one or two years by selling at low prices?

A. You mean in the course of the last year?

Q. Yes. A. No.

Q. Didn't he review the situation with you?

A. We had talked about it, yes.

Q. At the time that you were down to see Mr. Flynn you were going into the restaurant supply business and Mr. Phillips was going to have some connection with that business, wasn't he?

A. Well, he was a more or less consulting agent, if you want to call it that, gave me his advice as to how to proceed in the restaurant business, yes.

Q. He was going to be a consultant for you in your business? A. That is right.

Q. And in 1953 were you employed by Mr. Phil-

(Testimony of David L. Mears.)

lips? A. Yes, in 1953 I was.

Q. You were employed by Mr. Phillips for the whole year of 1953?

A. For the whole year, yes, I believe I was.

Q. Mr. Steiger was present on some occasions when these matters that you have testified to were discussed? A. That is right. [340]

Mr. Cullinan: That is all.

Redirect Examination

By Mr. Rothert:

Q. When you worked for Mr. Phillips did you work on the Hunt line or something else?

A. No, I worked on something else.

Mr. Rothert: I have no further questions, your Honor.

Mr. Cullinan: I have no further questions.

The Court: That is all.

(Counsel consulted with each other.)

Mr. Cullinan: I am trying to shorten something up, your Honor, if you will indulge us a moment. If your Honor please, with the permission of Mr. Rothert and with your permission I have another witness who will be about five minutes.

The Court: That is all right. Put him on.

WARD COUSINS

called as a witness on behalf of the defendant;
sworn.

The Clerk: Please state your name to the Court.

A. Ward Cousins.

Direct Examination

By Mr. Cullinan:

Q. Mr. Cousins, where are you employed?

A. Libby, McNeill & Libby.

Q. How long have you been with Libby, McNeill & Libby? A. 33 years.

Q. What is your position with Libby, McNeill & Libby? [341]

A. Sales manager, California Fruit Division.

Q. How long have you had that position?

A. Five years.

Q. Do you know the plaintiff, Wellington Phillips? A. Yes, I do.

Q. Did you know Wellington Phillips in 1951?

A. Yes, sir.

Q. At any time in 1951, to your knowledge, was Mr. Phillips considered by Libby, McNeill & Libby as a sales agent, broker or in any other capacity?

Mr. Rothert: I am going to object on the ground that calls for the witness' conclusion and opinion. There may have been other officers or representatives of Libby, McNeill & Libby that could have talked with Mr. Phillips and it would be this man's conclusion as to whether or not no one in the company had talked to him.

(Testimony of Ward Cousins.)

The Court: What is it that you want to bring out, counsel?

Mr. Cullinan: Here is what I want to bring out, your Honor: The plaintiff has testified that at the time in 1951 when he had these conversations with Libby, McNeill & Libby they were actively trying to get him to take over a similar type of work, and that he told them that he might lost the Libby account if he didn't get this one.

The Court: I do not have a distinct recollection of that testimony. Is that correct?

Mr. Rothert: Substantially that, that he told Mr. Flynn that he had talked to Libby, McNeill & Libby about a similar arrangement but nothing had materialized.

The Court: What do you want to do?

Mr. Cullinan: I have brought the sales manager from Libby, McNeill & Libby to testify there wasn't any.

The Court: That is a purely collateral matter. What bearing has it on this?

Mr. Cullinan: If it is agreed that it is collateral, then I won't pursue the subject. I would have had this job but for this—that point.

Mr. Rothert: No, we are not contending that we have changed our position to our detriment by giving up a Libby account in order to take the Hunt account. We are not making that contention.

The Court: That probably was trade talk. Is that what you would call it? Is that the point of this testimony?

(Testimony of Ward Cousins.)

Mr. Rothert: I think it amounts to more than puffing, but I do not think it has the significance that counsel attaches to it.

The Court: Is that all you want to bring out from this witness?

Mr. Cullinan: The second point is this:

Q. Mr. Cousins, is there in the trade or business any custom or usage with respect to whether sales agents and brokers [343] are assured of selecting any particular period of time?

Mr. Rothert: I am going to object to that as incompetent, irrelevant and immaterial.

The Court: I do not see the materiality of that.

Mr. Cullinan: I was getting to that. A custom and usage may explain the actions of the parties, and if the custom and usage is that these agreements are terminable, that is one thing.

The Court: I am afraid the people who framed the bill of rights would rise up in horror to hear you say that, because no man's property would be safe if his relations were to be determined by what somebody else's custom and practice was.

Mr. Cullinan: The question here is whether the parties contracted.

The Court: The question here is what arrangement the parties made. They have made an arrangement that was customarily made by other persons and they may not have, but I do not see what custom and practice has to do with it. I mentioned yesterday that so far—I have not heard all the evidence, of course—the three parties made a contract for

(Testimony of Ward Cousins.)

a specific period of time, or they made a contract in which no time was specified, or they made a contract that was revocable at the will of either party at any time.

Mr. Cullinan: Yes. [344]

The Court: That is a question of fact. It depends upon what they said.

Mr. Cullinan: Or they made a contract that was the normal and usual type of contract made in the business under similar circumstances.

The Court: That, of course, would involve something like we do in an antitrust case. We would have to make an inquiry as to all the practices in that regard in various enterprises at various times and covering various commodities. I am afraid we would get involved in a very complicated situation there. I would hold that that is incompetent in this case.

Mr. Rothert: May I ask another question, if your Honor please, of this witness?

Mr. Cullinan: There hasn't been any direct yet.

The Court: Are you going to open it up again? You did that once before.

Mr. Rothert: I will again if I think I can make a point.

The Court: I am not meaning to be critical, but there isn't any question now.

Mr. Rothert: It is merely on his position with the company and the setup with the Libby, McNeill company.

(Testimony of Ward Cousins.)

Mr. Cullinan: If your Honor please, there has been no direct examination at this time. [345]

Mr. Rothert: Other than who he is, what job he holds, and for how long.

The Court: You can ask him questions about that, of course, even though there is no testimony as to this case. Ask him what you want and I will rule on it.

Cross-Examination

By Mr. Rothert:

Q. In your position as sales manager, did you have under you men who had charge of different districts?

A. No; I had charge of men under me in charge of various product divisions. I do not have charge of sales through a sales organization. I have charge of sales of our products. It is rather complicated; if you want me to tell you about it, I will.

Q. You do not have charge of the sales organization, is that what you said?

A. That is correct.

Q. Who is Mr. Steward Smith of your company?

A. He is one of our branch salesmen.

Mr. Rothert: I have no further questions.

The Court: That is all you want of this witness?

Mr. Cullinan: That is all. Thank you, Mr. Cousins.

The Court: Will you gentlemen tell me how many more witnesses there are to be in this case?

Mr. Rothert: I have the accountant who kept the books and records of Wellington Phillips and he will be short. [346] I would like to ask a few questions of Mr. Steiger and Mr. Miller of Hunt Food Company as adverse witnesses and that would be all I would have.

The Court: Will you have many witnesses in addition to those who have already testified?

Mr. Cullinan: One other. I have Mr. Steiger and Mr. Miller that Mr. Rothert is going to call.

The Court: Can we resume at 1:30 tomorrow afternoon? I am asking you these questions because there are some other matters I have been asked to consider and I do not know whether I can do it on Friday or not. Do you think you could conclude the testimony tomorrow afternoon? Is there a chance?

Mr. Rothert: I think there is a reasonable chance.

Mr. Cullinan: Lawyers always say yes.

Mr. Rothert: Does your Honor mean you would not be able to hear this case on Friday?

The Court: No, I can hear the case if you gentlemen do not finish tomorrow, but there is some other matter where they would like to be heard.

Mr. Rothert: I do not mean to string it out, but if we were not going to be here Friday I would make other plans for Friday myself.

The Court: No, I will finish this case. I was trying to figure out my own plans. [347]

Mr. Rothert: I think there is an opportunity of finishing tomorrow if we start at 1:30.

The Court: We will take a recess until 1:30.

(Whereupon, an adjournment was taken to tomorrow, Thursday, December 1, 1955, at 1:30 o'clock p.m.) [347-A]

December 1, 1955, at 1:30 P.M.

The Clerk: Phillips versus Hunt Foods, further trial.

Mr. Cullinan: Ready.

Mr. Rothert: Ready, your Honor.

I would like to call Mr. Norman Willey.

NORMAN C. WILLEY

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Norman C. Willey—W-i-l-l-e-y.

Direct Examination

By Mr. Rothert:

Q. What is your business or profession, Mr. Willey? A. I am a public accountant.

Q. Have you had anything to do with the books of Wellington Phillips Co.? A. Yes, I have.

Q. Have you prepared financial statements covering the operations of that company's business during the years 1951, '52 and '53?

A. I prepared financial statements for '51 and '52 and tax returns for all the years. I don't believe I prepared a financial report for '53, but I did prepare the tax return.

Q. Are you connected in any way with the Over-

(Testimony of Norman C. Willey.)

seas Finance [349] Trading Company at the present time? A. I am.

Q. In what capacity?

A. I am an officer and director.

Q. When did you first become an officer of that company?

A. My recollection—to my recollection would be in either May or June of 1952.

Q. Prior to June of 1952 did you do any work for the Overseas Company?

A. I was their auditor, yes.

Q. And have you been familiar with the accounts between the Wellington Phillips Co. and the Overseas Finance and Trading Company at all times since 1951? A. Yes.

Q. Including 1951 up to date? A. Yes.

Q. I will hand you some tax returns and financial statements for 1951, '52 and '53 of the Wellington Phillips Company and ask you if these are returns or statements that you prepared?

A. Yes, they are.

Q. And did you prepare those after a study or audit of the books of the company?

A. After a limited audit of the books, that is correct.

Q. From a profit or loss standpoint did your audit disclose as to whether the Wellington Phillips Co. made a profit or [350] suffered a loss in 1951?

Mr. Cullinan: If your Honor please, this witness has testified to a limited audit of the books. As far as 1951 is concerned, we are willing to stipulate that

(Testimony of Norman C. Willey.)

we received a summary of the partnership return of income for the year 1951 that was sent to Mr. Church in May of 1952; but as far as this witness being able to tell from a limited audit of the books what the profit or loss of the company is, we would object to his testimony on that ground, that it is incompetent, irrelevant and immaterial, the proper foundation has not been established for his testimony.

Mr. Rothert: I can ask him what he means by a limited audit. The objection only affects the weight of the testimony.

The Court: I would think so. His statement is simply as a result of the examination of the books and records. I don't quite understand what you mean by—the testimony only is what the accountant found to be the status of the concern as to profit and loss from their own records. That is perfectly common accounting testimony.

Q. (By Mr. Rothert): What do you mean by a limited audit?

A. Well, in the sense I sent out no letters of verification to customers or to creditors. I did check the books, footed, posted, made such tests that I could make within a time limitation and satisfied myself within the scope of my work that the figures that I had put on the tax return are correct [351] to my knowledge and belief.

Q. Based on that examination of the books, what did you find was the condition as to profit or loss of the company for the year 1951?

(Testimony of Norman C. Willey.)

A. They made a profit in '51.

Q. And how much?

A. On the basis of this tax return it shows \$15,-
312.61.

Q. To what extent did you audit the books of the company for the year 1952?

A. It would be along the same lines.

Q. The same type of limit audit?

A. That is correct.

Q. And did you make up a profit and loss statement for the company for the year 1952?

A. I did.

Q. And what did you find was the experience of the company in '52 as to profit or loss?

A. Well, in that particular year I filed a tax return. It shows a profit of \$5,239.27, which subsequently was amended on the basis of information discovered later to a loss of \$10,426.49 because of certain invoices representing purchases did not come to my attention until a later date, but they did apply to the year 1952.

Q. So that when you finished all of the auditing that you did and had all the information that you had for the year 1952 [352] was the result a loss of approximately \$10,000? A. That is correct.

Q. Did you make a limited audit of the books for 1953? A. That is true.

Mr. Cullinan: If your Honor please, I will object to any testimony as to the profits or loss for the year 1953 because there is no relationship established in the record as to any loss in the year 1953

(Testimony of Norman C. Willey.)

as shown by the partnership return, no relationship between that loss, if any, and the loss of the Hunt Foods arrangement. They could have lost money for all sorts of reasons, but unless it is established that the only cause of loss in 1953 was the termination of this arrangement, then I think that——

The Court: I think counsel is just offering this for the purpose of showing the status of the business at that time.

Mr. Rothert: That's right.

The Court: The condition at that time might not be a factor at all in any calculations of damages if a breach is shown. I will allow it.

Q. (By Mr. Rothert): What did your limited audit for 1953 show as to whether the company earned a profit or loss and in what amount?

A. According to the tax return, it shows a loss of \$57,883.61.

Q. That is for the entire year?

A. That is for the entire year. [353]

Q. During the period from January 1st of 1952 to May 1st of 1953 did the Wellington Phillips Company pay over or send money to Overseas Trading and Finance Company?

A. Yes, they did.

Q. Did you make a list of the times when the payments were made and in what amounts?

A. Yes.

Q. From the books of the company?

A. Either from their books or from the books of Overseas.

(Testimony of Norman C. Willey.)

Q. And do you have that list with you?

A. Yes, I have this list.

Mr. Cullinan: If your Honor please, if there is any tabulation from the books of Overseas, we will object to it because we don't know anything about it.

The Court: Are they the same?

A. They would be the same, your Honor.

The Court: Then it doesn't make any difference.

Q. (By Mr. Rothert): Will you state when those payments were made and how much?

A. On the basis of this list it shows an amount of \$500 in September of 1952; \$1,000 in October of 1952; \$500 in November of 1952, and another \$500 in November of 1952; \$2,500 in December of 1952, \$350 in January of 1953; \$700 in February of 1953; \$2,000 in March of 1953; another \$2,000 in March of 1953, and \$2,000 in April of 1953. [354]

Q. Do you know what those checks add up to?

A. They should add up to \$12,050.

Q. Did Wellington Phillips Company from time to time borrow money from the Overseas for use in its business?

A. That had been done, yes.

Q. On the first of May, 1953, were you then an officer of the Overseas Company?

A. In May of '53?

Q. Yes. A. Yes, I was.

Q. At any time after May 1, 1953, did the Overseas Finance and Trading Company have funds available to be borrowed by the Phillips Company?

(Testimony of Norman C. Willey.)

Mr. Cullinan: I will object to that, if your Honor please.

The Court: What is the materiality of that?

Mr. Rothert: Well, I think it is material to the question of the ability and opportunity of the Phillips Company after termination to revive the bidding business that it had before.

The Court: Well, I don't think that would have anything to do with the ability, with the question of whether they were willing to give them money or not.

Mr. Rothert: My question was intended to ask for whether or not there was any money available whether they were willing or not. As I understand it, they had capital available if they were willing to lend it to the Phillips Company during an [355] earlier period, but at this time there wasn't any money there whether they wanted to lend it or not. That is my understanding of it. The argument might be made, all they had to do was borrow money from Overseas and get back in the bidding business again, and I want to show that that opportunity was not available.

The Court: Well, I will allow the testimony. I don't quite see what the materiality is.

The Witness: Would you mind repeating that question?

The Court: At that time did the Overseas Company have funds available they could have if they had been willing to loan to the plaintiff here.

A. Well, it is my recollection at that particular

(Testimony of Norman C. Willey.)

period that what funds they did have were definitely tied up in a camera business, with a camera distributor, and they were very active, I know, at that time with the distributor. It would have required a considerable amount of money to finance that camera operation, so I would say that the funds available for other purposes were quite limited at that particular moment.

Q. Do you have a statement of assets and liabilities for the Phillips Company applicable to any part of the year 1953?

A. Only insofar as up here on the tax return.

Q. Where would that be?

A. This would be the balance sheet right here. Here's your [356] assets up here, and your liability side. This is the beginning and end of the year. Your capital accounts are here.

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Willey, with respect to these payments to Overseas, in 1952 Federal tax liens had been filed against Overseas Trading Company, had they not?

A. I don't remember the exact period, sir, but at somewhere along in there I would say they were, yes.

Q. Don't you remember that on May 16, 1952, a federal tax lien of \$5,673 was filed against Over-

(Testimony of Norman C. Willey.)

seas? A. I don't remember the date, sir.

Q. It was in May, 1952, that tax trouble developed, wasn't it?

A. It could be. It could be.

Q. And you arranged with the Government, did you not, Overseas, to pay that—first, the total tax liability to the federal government of Overseas at that time was in excess of \$20,000, wasn't it—\$27,000?

A. The total tax liability?

Q. Yes.

A. Would that be additional assessments on the excise tax?

Q. The total amount of the tax liens filed.

A. I couldn't tell you right at this moment without looking it up.

Q. Can you tell me that in 1952 tax liens of approximately [357] \$27,000 were filed against Overseas, were they not?

A. All I recall is that there were tax liens; the amounts I don't recall at the moment.

Q. Can you tell us with any degree of accuracy as to whether it was around 25 or \$27,000?

A. Without going back through my files, I couldn't tell you, no. All I can tell you is that there were liens of some kind; the amount I couldn't say.

Q. Do you know that there was a tax lien of \$983 filed on June 10, 1952?

A. There again I don't remember these amounts.

Q. You don't remember?

A. No, I don't.

Q. June 17, 1952, a tax lien of \$5,323; you don't

(Testimony of Norman C. Willey.)

remember that either? A. No.

Q. But you did work out an agreement in 1952 with the Government to pay off these tax liens at the rate of a thousand dollars a month, didn't you?

A. There was an arrangement made with the tax collector's office, yes.

Q. The first of these payments that you made in your direct testimony from Phillips Company to Overseas started in September of '52, didn't it?

A. That is correct. [358]

Q. And that was as I have it here, just briefly, \$500 in September, a thousand in October, a thousand in November? A. That's right.

Q. In the books of Wellington Phillips Company there was a capital account and a liability account for Overseas, was there not?

A. As I recall it, there were, yes.

Q. And on the books funds were transferred back and forth between the capital account and the liability account, were they not?

A. That is my recollection, yes.

Q. Now, in December of 1952—and let me state what my records show and if it isn't right, I can correct it by the books—on December 31, 1952, a journal entry was made, was it not, deducting \$11,400 from the Overseas account in Phillips Company? A. That I don't recall.

Mr. Cullinan: Do you have that journal?

The Court: What are you trying to show: that payments were capital withdrawals?

Mr. Cullinan: Their contention is that they

(Testimony of Norman C. Willey.)

withdrew capital because they needed it in the business now that they had the Hunt account. That is one of their claims for estoppel in the statute of fraud; that they said they were going to withdraw some capital and they did so. And I wanted to show [359] here that these capital withdrawals were mostly bookkeeping entries, and one of them \$11,400 in December '52, most of it went to the Phillips Corporation which had just been formed.

The Court: There has been no testimony here on that. They were testifying as to cash withdrawals. That is all this witness testified to.

Mr. Cullinan: Yes.

The Court: You are referring to some other item. There has been no testimony on that so far. Are you trying to meet something that hasn't yet been presented? It isn't clear to me.

Mr. Cullinan: No, I think the plaintiff testified that on some occasions funds were withdrawn and paid to Overseas but were paid as a debt rather than as a withdrawal of capital.

Mr. Rothert: He said that he put "loan" on the checks.

Mr. Cullinan: He put "loan" on the checks?

The Court: He did what?

Mr. Cullinan: The plaintiff testified that when he paid these checks to Overseas he wrote the word "loan" on the checks.

The Court: I see.

Mr. Cullinan: But he didn't state whether it

(Testimony of Norman C. Willey.)

was a capital withdrawal or a payment on the loan, according to the books.

The Court: Are these the same checks? Are these the checks that were issued in payment of these amounts that the witness has [360] testified to?

Mr. Rothert: They are the same checks, your Honor, I am quite sure; I mean the same checks that the plaintiff testified to.

The Court: All I was trying to find out, Mr. Cullinan, is are you talking about something different in addition to these items of cash that were covered by checks?

Mr. Cullinan: Well, I am trying to find out——

The Court: If you are, there has been no testimony here.

Mr. Cullinan: I am trying to find out whether these checks have been in relationship to the deductions from the capital account and deductions from the liability account in the books of the company.

The Court: You might ask him that.

Q. (By Mr. Cullinan): Do you know whether these checks were charged as the withdrawals of capital or as a deduction on the liability account in the books of Wellington Phillips Company?

A. Without an analysis I don't think I could tell you that; I can only presume.

Q. Well, don't presume. You don't know?

A. I don't know, no, without an examination.

Q. Do you keep the books yourself?

(Testimony of Norman C. Willey.)

A. Which is that?

Q. The Wellington Phillips Company books.

A. Well, I don't actually keep them to the extent that I [361] don't make the entries from the checks or the cash receipts records, but I do foot them, post them to the general ledger.

Q. I see. So all your information from the books stems from whatever Mr. Phillips or somebody else puts in the books; isn't that so?

A. That is roughly it, yes, plus what tests I like to make.

Q. Well, I will ask you this, Mr. Willey, from the income tax returns that you had, is it not a fact that they show at the end of 1951 the Overseas capital in the Wellington Phillips partnership amounted to \$16,202,75? That is in the 1951 return.

A. That's correct.

Q. Yes. Isn't it true also that the 1952 return shows to the end of 1952 Overseas capital in the Wellington Phillips partnership was \$16,422.42?

A. That is on the \$16,422.42, is that the figure?

Q. Yes.

A. That is on the return originally filed.

Q. That was on the return originally filed?

A. Yes.

Q. When was that return filed, that first return of 1952?

A. That would be filed within the time.

Q. Before March of 1953?

A. Well, unless we had an extension of time,

(Testimony of Norman C. Willey.)

either before March or within the extended [362] period.

Q. When was the amended return for 1952——

A. Some time this year.

Q. So just this year. Can you tell us when this year?

A. No, I could not without looking into my file.

Q. Well, the amended return was prepared this year, too? A. Yes, it was.

Q. And the reason for the amendment this year was, you say, that certain invoices hadn't been found or hadn't been entered as of 1952?

A. 1952, that is correct.

Mr. Cullinan: That's all.

Redirect Examination

By Mr. Rothert:

Q. What did the amended return for 1952 show as to the Overseas capital account to Wellington Phillips? A. It shows \$8,589.55.

Q. These checks that you enumerated, they are paid to Overseas starting in September of 1952, were they a loan or were they a capital account, or what were those payments?

A. You mean how were they treated in the books, or what was the intention?

Q. Well, how were they handled in the books?

A. Well, as I recall——

Mr. Cullinan: If your Honor please, how they

(Testimony of Norman C. Willey.)

were handled in the books of Overseas is certainly hearsay and not binding as to this defendant. [363]

The Court: Well, I think that objection is good; the witness hasn't any firsthand information as to the nature of the transaction.

Q. (By Mr. Rothert): Were some of these payments made when you were an officer of the Overseas?

A. Yes, it would be some time during that period, yes.

Q. Were those payments, during the period you were an officer of Overseas Corporation taken by Overseas as a loan?

A. Well, they would be applied against the receivable on the books of Overseas against a debit balance, they would be credited against a debit balance due from Wellington Phillips and Company.

Q. Well, in September of 1952, when the first of these checks was paid, what was the state of accounts between the two companies as to who owed who money, if there was any money owed?

Mr. Cullinan: I think the books are the best evidence of that, if your Honor please. If they had some summary we could look at and check the books or—but I think just an offhand statement of what the balance was at a certain time——

Mr. Rothert: I didn't ask for the balance, asked whether it was a plus or minus.

The Court: I think what counsel is asking for is what was the relationship of the parties.

Mr. Rothert: Yes. [364]

(Testimony of Norman C. Willey.)

The Court: As creditor and debtor between one another, who was the creditor and who was the debtor, if he knows.

The Witness: Actually I don't recall. I wouldn't—I would not wish to say with any assurance which—who had the debit and who had the credit.

Q. (By Mr. Rothert): Was there any time when, during this period we are talking about, the balance of accounts between the two companies showed that Phillips Company was a creditor and Overseas owed them money as a net balance?

Mr. Cullinan: I will object to that as incompetent, irrelevant and immaterial, any time one owed the other some money.

Mr. Rothert: It's preliminary, depending upon what the answer is.

The Court: Did you have any active part in this Overseas Company?

The Witness: Yes, I do, sir.

The Court: You were familiar with their business transactions?

The Witness: Yes.

The Court: With the Phillips Company?

The Witness: Yes, I am, sir.

The Court: You ought to know, then, whether your company owed them money or their company owed you money. It's a very simple matter. Can you answer it or not? [365]

The Witness: Well, to my recollection, there were times when we owed them money, there were times when they owed us money.

(Testimony of Norman C. Willey.)

The Court: You mean you borrowed money from them, too?

The Witness: Well, the account on one set of books would show that—take, for instance, the account on the books of Overseas, we would have a credit balance, very possibly, of money owing to Wellington Phillips and Company; at other times it could be the other way. That is my recollection.

The Court: Well, all I was trying to find out was whether or not the causal relationship between the companies was such that you were lending money to them or were they lending money to you?

The Witness: Primarily we were lending them money.

The Court: At times you borrowed money from them?

The Witness: It could be so, sir.

The Court: You don't know?

The Witness: I don't recall; no, I do not recall these balances.

Q. (By Mr. Rothert): Well, when you gave that answer did you take into consideration the original capital or money which Overseas placed as a limited partner in the Wellington Phillips Company?

A. Well, of course, that was left undisturbed, the capital account at the very beginning. I frankly couldn't state who [366] owed who money at a certain series of times without actually going into the books and making the examination.

(Testimony of Norman C. Willey.)

The Court: Well, the Overseas Company had a capital interest in this company?

The Witness: That is correct.

The Court: A special partner, is that right?

The Witness: That is correct, sir.

The Court: And was that carried in the capital account of the Phillips Company, there was set up the capital interest of the Overseas Company?

The Witness: That is correct, sir.

The Court: Now, did they withdraw, did the Overseas Agency withdraw any part of their capital account?

The Witness: Not the capital, but this liability account which represented advances and returns of these advances.

Q. (By Mr. Rothert): When you testified about the debtor-creditor relationship, were you speaking only of the liability account and not the capital account?

A. I am speaking of the liability account.

Q. Was the liability account an account that Phillips Company used currently in its business and for instance——

Mr. Cullinan: Just a moment, I don't understand——

Mr. Rothert: I will withdraw that.

The Court: Gentlemen, I think we have spent enough time on that. [367]

Mr. Rothert: I have no further questions.

The Court: This should be a matter of book-keeping records, that would show, if you want——

Mr. Rothert: I have no further questions.

Mr. Cullinan: I have no further questions.

The Court: That is all, sir.

(Witness excused.)

Mr. Rothert: I would like to call Mr. Steiger.

EDWARD STEIGER

called as an adverse witness, by the plaintiff; sworn.

The Clerk: Will you please state your name to the Court, sir.

The Witness: Edward Steiger.

Mr. Rothert: I am calling Mr. Steiger as an adverse witness, your Honor.

Direct Examination

By Mr. Rothert:

Q. You are an employee of the Hunt's Food Corporation, are you? A. That's right.

Q. What is your position now?

A. Assistant District Sales Manager.

Q. And did you hold that same position at all times since the summer of 1951? A. Yes.

Q. Prior to the time that Phillips Company started calling on the commissary stores in Northern California and selling Hunt products to them, how many salesmen did your company have who regularly called on those commissary stores?

A. Can I take a moment?

The Court: Sure.

Q. (By Mr. Rothert): Or approximately.

(Testimony of Edward Steiger.)

A. We used roughly three salesmen to a very limited extent.

Q. You mean they had a lot of other business in addition to the commissary stores?

A. That's right.

Q. Well, are you familiar with the—Well, were all of the commissary stores in Northern California contacted by your salesmen during the summer of 1951 or were there some that weren't called on?

A. I could answer that question by saying that to my knowledge all of the commissary stores were being called on regularly where it appeared that those commissary stores might buy, might purchase our products. There could have been commissary stores on whom our salesmen hadn't called too recently due to the fact that they might not be able to sell them.

Q. Did your salesmen in making sales to the commissaries in the summer of 1951 sell at the jobber price, at the Hunt's jobber price? [369]

A. No, they sold at a price slightly above the jobber's price.

Q. Well, is it based on f.o.b. Hayward plus a certain additional amount?

A. Yes.

Q. During the time that Wellington Phillips Company called on those commissary stores for your company—I mean, selling Hunt products—at what price did Hunt's sell to Phillips?

A. Generally speaking, at an identical price.

Q. Identical with the price that the salesmen

(Testimony of Edward Steiger.)

had previously been selling to the commissary stores; is that what you mean by identical?

A. Yes.

Q. Generally speaking? A. Right.

Q. Did you call on some of the commissary store purchasing officers with Mr. Phillips in the early part of 1953? A. Yes.

Q. Had you called on those stores, some of those commissary stores with Mr. Phillips during 1952 at all?

A. I don't recall; I don't recollect. I don't believe that I did.

Q. You didn't visit all the commissary stores with Mr. Phillips, did you? A. No. [370]

Q. In those commissary stores that you visited with Mr. Phillips, did you find that some commissary stores were then buying Hunt's products that had not been buying Hunt's products through your salesmen in the summer of 1951?

A. Well, that is a little difficult to answer, because to give you an answer I would have to remember seeing invoices covering sales.

Q. All right. Was it volume of sales that Mr. Phillips made to the commissary stores during the time he—between December 1, 1951, and into April of 1953, greater in volume than the volume that your salesmen had been selling prior to that time?

A. I am quite sure it was.

Q. Was it as much as double the volume?

A. That I couldn't say accurately. I would have——

(Testimony of Edward Steiger.)

Q. Do you recall at any time whether you told Mr. Phillips he had doubled the volume?

A. I could have; based on the bases I have visited.

Q. Do you recall visiting Camp Mather?

A. Yes.

Q. The commissary there, I mean, of course, with Mr. Phillips?

A. With Mr. Phillips.

Q. That was in about March of 1953?

A. Yes. [371]

Q. And did you find that the commissary at Camp Mather, that most of the Hunt line was then being handled by the commissary?

A. At Mather Field?

Q. Yes.

A. The question in my mind is, was it Mather Field or was it not the base where Mr. Phillips was promised the business, or if that base already had our representation.

Q. You mean, it may be when you were there the purchasing officer stated that they would take on practically the entire Hunt line?

A. Yes, it could be that or it could be that they had our products. I believe that a young lieutenant stated that he was—he had checked over our items and thought that he would handle. I believe that's what I recall.

Mr. Rothert: Do you keep a list you could tell whether there is an April 1, 1953, letter as a Defendant's exhibit?

(Testimony of Edward Steiger.)

The Court: As a defendant's exhibit?

Mr. Rothert: I'm sure that it isn't a plaintiff; I am quite sure it isn't a plaintiff's exhibit. I don't think it has been introduced yet, but I was checking.

The Court: There is April 15.

Mr. Rothert: Yes, I am familiar with that one. These are in chronological order in the exhibit file?

The Court: There is no April 1st in my record.

Q. (By Mr. Rothert): I will show you, Mr. Steiger, a photostatic [372] copy of a letter from you to Mr. Larry Phillips, Wellington Phillips Company, dated April 1, 1953.

(Showing letter to witness.)

The Court: What is the question, counsel?

Q. (By Mr. Rothert): You remember seeing that letter, Mr. Steiger? A. I do.

Q. And does the last paragraph of the letter refresh your recollection at all as to whether at Camp Mather, Mather Field, you found the Hunt line was already in, or that the purchasing officer merely say that he would put the Hunt line in?

A. I still can't tell you accurately whether the full Hunt line was in the Mather Field or if it was in a limited way.

Q. Yes.

A. And the promise from a purchasing officer was made to put the full line in.

Q. How long have you been in the sales end of the Hunt's business?

A. With Hunt's Foods, Inc.?

Q. Yes, Hunt Foods, Inc.

(Testimony of Edward Steiger.)

A. Almost ten years.

Q. And were you in the canned food business before that? A. In a limited way, yes.

Q. In sales, the sales part of it? [373]

A. Sales and some production.

Q. Well, from what you observed in making visits to the commissary stores with Mr. Phillips, it was your opinion, wasn't it, that he had made a great deal of progress in his selling program?

A. Yes.

Q. Was it your opinion at that time that he was going to succeed in getting the full Hunt line into a number of commissary stores?

Mr. Cullinan: I will object to that, your Honor, as calling for a conclusion and opinion of this witness, what he thought the plaintiff might do as some time in the future.

The Court: It is already in evidence; a letter to that effect was introduced already.

Mr. Rothert: More or less says that in this letter.

The Court: No, another letter.

Mr. Rothert: Yes, I know. I think this man is an experienced man in the sales end of the business, qualified to have an opinion if he has one.

The Court: It is already in evidence. I don't know why you want to ask it again orally, unless it is denied.

Q. (By Mr. Rothert): Did you find on these visits to the commissary stores that several com-

(Testimony of Edward Steiger.)

peting lines of canned good products had been eliminated from competition with Hunt's lines? [374]

A. Yes, I did.

Q. I show you Plaintiff's Exhibit No. 5 and ask you if you recall that letter, sending that letter to Mr. Phillips.

Mr. Cullinan: What date is that, Mr.—

Mr. Rothert: April 16th, 1953.

The Court: What question have you?

Mr. Rothert: I am sorry.

Q. You recall that letter? A. I do.

Q. And the account attached to it?

A. I do.

Q. At the time of this letter had Mr. Phillips reduced the amount of money that was kept on the Hunt's invoices to him from the amount that had been owing prior to the writing of that letter? [375]

Mr. Cullinan: If your Honor please, there is no showing that this witness knows how much at any given time the balance actually due by the plaintiff to Hunt Foods is. The records of Hunt or the Plaintiff would be the ones to establish that.

The Court: Is that the letter to which the statement is attached?

Mr. Rothert: Yes; it says: "Appears to be in much better shape than previous statements."

The Court: What do you want the witness to say? To contradict that statement in some way?

Mr. Rothert: No.

The Court: I don't know just what it is that you are trying to show.

(Testimony of Edward Steiger.)

Q. (By Mr. Rothert): Well, between the time you wrote this letter on April 16th, 1953, discussing the state of Mr. Phillips' account until May 1st of '53, did you at any time talk to Mr. Phillips about the state of his account?

A. As I recall, I did.

Q. You say you did. During that two weeks period?

A. Would you state that date again?

Q. From April 16, '53, until the 1st of May.

A. Let me change that statement to I don't recall contacting him over the payment of any invoices due or past due. I don't recall.

Q. You mean after the date of that letter or during that [376] period only?

A. During that period.

Q. Did you talk to Mr. Phillips and inform him that he was no longer going to be able to sell to the commissaries?

A. I don't recall that I told him that definitely he wouldn't be able to sell the commissaries.

Q. Do you recall that you mentioned the subject of his going to the commissaries in a conversation during the month of April, '53?

A. Yes, I talked to him in April, I must have, and selling the commissaries must have been in the conversation.

Q. This is the time when his selling terminated, wasn't it—about the time it terminated?

A. I understand about that time that it was terminated.

(Testimony of Edward Steiger.)

Q. And did you talk to him on the telephone?

A. I talked to him on the telephone.

Q. And did you say in substance that he would no longer be allowed to sell to the commissary stores?

Mr. Cullinan: Why don't you let the witness say what he said without asking the substance of it? I think that is a conclusion of the witness. Let him say what was said.

Mr. Rothert: Well, I may, if I wish, ask leading questions, I believe, your Honor.

The Court: Overruled.

Q. (By Mr. Rothert): Well, what did you say to Mr. Phillips [376] when you called him up?

A. When?

Q. Sometime in late April, 1953, and about the time when his selling to the commissaries terminated.

A. I hope I am answering your question correctly. I don't recall.

The Court: Don't worry about whether you hope; just tell us what happened, please. What did you say to him over the telephone, if you remember?

A. Your Honor, I am trying to answer it to the best of my ability. I don't recall telling him whether or not he would continue selling the commissaries.

Q. (By Mr. Rothert): I am just asking you what you said.

A. I don't remember what I said; we had quite a few conversations.

(Testimony of Edward Steiger.)

Q. In other words——

The Court: Did you have any discussion with Mr. Phillips at all about the discontinuance of his relationship over the telephone in or about that time? A. Yes, I must have, your Honor.

Q. I don't want you to tell me what you must have. If you don't recall it, it is no crime to say you don't recall it. What we want to know is did you have any conversation on that subject?

A. Yes, your Honor, I did. [378]

The Court: All right; what was said? That is what counsel wants to know.

A. I believe the conversation emanated from Mr. Phillips advising that he had heard rumors and so on and so forth about the lines being taken away from him.

Mr. Cullinan: I can't hear. Would you speak up?

A. Yes.

The Court: Read what he said so far.

(Answer read.)

The Court: And then did you say anything?

A. Yes, sir, your Honor, I said that I didn't know and had no official advice or information on that subject.

Q. (By Mr. Rothert): Did you at some time get official advice or information on the subject?

A. I don't recall.

Q. Were you present at any meeting where Mr. Phillips and Mr.——

(Testimony of Edward Steiger.)

The Court: For my information will you stop there just a moment, counsel?

Mr. Rothert: Yes.

The Court: You are the assistant district sales manager of the company. Now you must have learned, the sales being in your charge, what happened to the Phillips account at some time or another.

A. I do, sir, very definitely, but I didn't tell Mr. Phillips [379] prior to his being advised by my superior.

Q. I understood that, but the counsel asked you whether you didn't learn about it and you said you didn't know. All I was trying to inquire was—I think you may have been mistaken about it, because you must have learned about it at some time or other.

A. Yes, I heard of it, but I didn't know until my superior informed me in his presence.

Q. (By Mr. Rothert): Were you present at any meeting that Mr. Miller and Mr. Phillips attended in which Mr. Phillips was told that his selling to the commissaries was terminated?

A. Yes.

Q. Where was that meeting held?

A. In my office in Hayward.

Q. Now before that meeting, had your superior told you that Mr. Phillips was going to be terminated?

A. Well, he probably told me maybe an hour and 15 minutes before Mr. Phillips arrived.

(Testimony of Edward Steiger.)

Q. When did that meeting take place?

A. The date escapes me at present. There is a record of the date. I wish I could answer it accurately, but I can't.

Q. Was it about the first of May, 1953?

A. The first of May of 1953? I am still guessing, but that is somewhere near the time.

Q. Was it Mr. Miller in that meeting who told Mr. Phillips [380] that it was terminated?

A. Yes.

Q. Now in that meeting there was no mention made of Mr. Phillips' account, was there?

A. Well, I would say that there was.

Q. Well, did Mr. Miller in that meeting tell Mr. Phillips that the company had made arrangements with Francois Schwarz Company to handle sales to the military and that therefore he wouldn't be able to sell to the commissary stores?

A. In essence that is about what he said, I believe.

Q. Mr. Miller didn't state in substance that Mr. Phillips' account was a reason for the termination, did he?

Mr. Cullinan: If your Honor please, I think he ought to ask for the conversation, not using counsel's words: did he state that this was a reason. The whole conversation should come in. I think counsel shouldn't try to characterize any part of the conversation.

The Court: Well, what statement was made by

(Testimony of Edward Steiger.)

Mr. Miller as to the reasons for discontinuing the arrangement with Phillips, as you recall?

A. Well, your Honor, as I recall, Mr. Miller stated that our salesmen originally had handled the commissaries; that they had done a pretty good job, but they hadn't actually, well, gotten the sales volume that they should have, that is, in the company's opinion they should have. Therefore, a change [381] was made and Wellington Phillips Company was selected, and at this time the company again felt that a better job could be done and another selection had been made; that—it is kind of difficult to remember it all, but that would be roughly what was said. There was a mention of the account that it was continually past due, or words to that effect. That is as close as I can remember, your Honor.

Q. Well, did this statement of Mr. Miller surprise you?

A. Well, he had told me some time that day prior to Mr. Phillips being present at the meeting.

Q. When he told you previously, then, did his statement that they were going to change the relationship surprise you?

A. No, sir, it didn't.

Q. You had just got through writing him a very glowing letter to Mr. Phillips about his business. I should think it would have surprised you, wouldn't you?

A. May I say this: that perhaps I am not the best letter writer in the world. I believe I am a good

(Testimony of Edward Steiger.)

salesman or sales manager, and the intent in my letter was to create enthusiasm, to maintain enthusiasm, on the part of whoever sells for us, our own salesmen or representatives. So in my opinion, my statements were relative to, No. 1, the job that our salesmen had done, which wasn't as good as Mr. Phillips; and, No. 2, to the bases on which we had been. I had not been on the other bases, and I understand—that is, I remember that we [382] were not selling the other bases. So my letter was glowing for several reasons.

The Court: Any other questions?

Mr. Rothert: Yes, I have, your Honor.

Q. I will show Mr. Steiger a copy of a letter and ask him if he recalls sending that letter to Mr. Phillips. Do you recognize that letter?

A. I do.

Mr. Rothert: This is another letter which I would like to introduce as plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 10 introduced and filed into evidence.

Mr. Rothert: May I read this letter or should I pass it up to your Honor?

The Court: Pass it up. You can go on to something else.

Mr. Rothert: I want to ask him a couple of questions about that.

The Court: Go ahead, then.

Q. (By Mr. Rothert): When you wrote this letter of March 6, Plaintiff's Exhibit 10. Mr. Steiger, didn't you feel that Mr. Phillips had been

(Testimony of Edward Steiger.)

very successful in handling the commissary accounts?

A. The letter was written after I called on the accounts with Mr. Phillips and the letter pertains to the accounts on which I called with Mr. [383] Phillips.

Q. Yes. And weren't you amazed with the success he had had in handling those particular commissary accounts? A. Yes.

The Court: Isn't that letter in evidence already?

Mr. Rothert: I don't think so.

The Court: The March 6th letter is Plaintiff's Exhibit 4.

Mr. Cullinan: It is Exhibit 4.

Mr. Rothert: Well, I am sorry; it is, yes.

The Court: Strike out that; we don't need two exhibits the same.

Q. (By Mr. Rothert): During the time that Mr. Phillips was selling Hunt's products to the commissaries did you ask him to take over the Hamilton Field account to replace one of the salesmen who had been doing it up to that time?

A. I did, but of course, that is relative to another subject.

Q. Well, for a part of the time after Phillips started, one of your salesmen was handling the Hamilton Air Force commissary; is that true?

A. That is right.

Q. And then you asked Phillips to take it over in place of the salesman?

(Testimony of Edward Steiger.)

A. Once we had paved the way with the purchasing officer, yes.

Q. And you turned over some sales that the salesman had already made, you turned those over to Mr. Phillips, didn't [384] you?

A. I seem to recall that we took a sale that the salesman had made and turned it over to him.

Q. And your company sent the goods and billed Mr. Phillips for the amount?

A. I don't recall that. It could be; I don't recall it.

Q. Did you go to Mare Island commissary store with Mr. Phillips during one of these trips?

A. Yes.

Q. And there did the purchasing officer state that he would take on the full Hunt's line?

A. My impression on calling on that base was the purchasing and contracting officer was a little bit difficult to agree outright to any specific time when he would buy a certain number of items, although he did say that he was considering the Hunt line.

Q. Did you ask Mr. Phillips to take over the commissary at San Luis Obispo which he hadn't covered during the first part of his work?

A. I believe so.

Q. Did you turn over to him an order that the salesman had sold to San Luis Obispo to have Phillips fill it?

A. I don't recall that.

Q. Did the commissary stores pay for the goods

(Testimony of Edward Steiger.)

they purchased from Hunt's as much as 60 days after delivery? [385]

A. I would have no knowledge of their actual paying habits.

Q. Were you present at any conversation between Mr. Phillips and Mr. Flynn in the late summer or early fall of 1951 when Mr. Phillips' arrangements with the company were first discussed; I mean in the early stages of the discussion?

A. Yes, I was present; right, I was.

Q. Do you recall any occasion when you were present when Mr. David Mears was also present?

A. Yes, that was in my office.

Q. You recall an occasion in your office?

A. Right.

Q. Was Mr. Flynn in your office, too, at that time?

A. Yes, Mr. Flynn was.

Q. Can you recall about when that discussion took place?

A. No, I can't recall. All I can say is that all the meetings held were held in my office. I was at—I attended each meeting and was there the majority of the time, but I do not recall the actual dates.

Q. Well, would you say that these meetings took place about August or September of '51?

A. It is possible.

Q. At a meeting in which Mr. David Mears was present did Mr. Phillips say that he had surveyed the commissary stores and the commissary business and indicated a wish to sell the Hunt's line to the commissary stores? [386]

(Testimony of Edward Steiger.)

A. Yes, he did.

Q. And did he state in that discussion that he would be unable to make money for a year or two because of the Hunt's prices being established at the bases already?

A. Yes, that is a familiar statement.

Q. And did he say that he wouldn't want to take on the line unless he could have the account for a period of time beyond the first year or two when he wouldn't make any profit?

A. No; to my knowledge that statement was not made.

Q. You mean you know positively that it wasn't made or you do not have any recollection of that being said?

A. I would say I am quite sure that the statement wasn't made based on the fact that he was asking us rather than telling us.

Q. He was asking you rather than telling you?

A. I mean he was asking for the business from us, so I can't—I don't recollect him asking for any specific time.

Q. You do remember him saying that if he took it he wouldn't be able to make any money for a year?

The Court: He has answered that already.

The Witness: I have answered that.

Q. (By Mr. Rothert): Didn't he say that he would have to have the line for more than a year or two in order to have any chance to make money?

A. I don't recall that. [387]

Q. Did Mr. Phillips mention that his present

(Testimony of Edward Steiger.)

business at that time, the bidding business, was profitable; that he was making money at it?

A. I don't remember any "profits" word or words in the statement; he merely stated that he was doing a bidding business.

Q. Did he say that if he took on the Hunt's line he would devote his own attention to it and he would have to give up a lot of his bidding activities?

A. I don't recall that; no.

Q. Did Mr. Phillips say that he personally would handle the sales through the commissaries if you authorized him to sell to the commissaries?

A. No; he had a salesman calling out of town for the commissaries, so——

Q. Did Mr. Flynn in that conversation tell Mr. Phillips to go down and tell Mr. Miller about it?

A. Well, Mr. Flynn suggested that if Mr. Phillips wanted to represent us that he would have to go to the proper authority, perhaps also to the manager of the export or government department in addition to Mr. Miller.

Q. Now, Mr. Flynn didn't say to Mr. Phillips "that you should go to the proper authority or perhaps to the export department"? He didn't say that, did he?

A. Pardon me, I included in there Mr. [388] Miller.

Q. There was a memorandum sent out from Mr. Flynn's office to the commissary stores advising them that Phillips and Company was appointed the

(Testimony of Edward Steiger.)

exclusive jobber to sell Hunt's products to the commissary stores, wasn't there?

A. Yes; there was.

Q. That is Plaintiff's Exhibit 3 (showing paper to witness), and that was issued out of the Hayward office where you and Mr. Flynn had your offices; isn't that true?

A. Yes, sir; this is a rewrite of the suggested bulletin by Mr. Phillips.

Q. With a few minor changes; is that right?

A. To make it applicable to our salesmen as well as to the contracting officers.

Q. Mr. Flynn and you were the ones that decided to send that out, that is, made the decision for Hunt Food Company to send it out, weren't you?

Mr. Cullinan: Just a minute, if your Honor please. That calls for the conclusion of this witness. He can ask who sent it out, but putting the words in the mouth——

Mr. Rothert: That is all right; I will withdraw it.

Q. Do you know whether or not Mr. Miller or any other higher authority in Hunt Food Company did anything to authorize that memorandum to be sent out?

A. To my knowledge it wasn't authorized by anyone superior to Mr. Flynn. [389]

Q. Do you know who it was in the Hunt organization who decided, made the decision that Phillips and Company could act as exclusive jobber to sell

(Testimony of Edward Steiger.)

Hunt's products to the commissary stores in northern California?

A. Well, to my knowledge, Mr. Miller would be the only one I know with authority.

Q. Well now, I don't mean that.

The Court: He just wanted to know if you know who did it.

A. I don't really know, except that Mr. Flynn told me that Mr. Miller, after thinking it over after probably some consultations had agreed that we could use the Wellington Phillips Company as a government jobber. The "exclusive" portion came in that Mr. Miller suggested to the commissaries——

Q. Up until the time that Mr. Phillips sent over a suggested letter there had been no discussion about Mr. Phillips being an exclusive jobber to sell to the commissary stores?

Mr. Cullinan: He didn't state that.

Mr. Rothert: I am asking him if that is what he means. May we have his last answer read?

(Previous answer read.)

Q. My question is, wasn't the exclusive nature of them proposed arrangement with Mr. Phillips discussed with you and Mr. Flynn?

A. Yes. [390]

Q. Now, this authority that you say came from Mr. Miller, didn't that include the exclusive nature of the arrangement, exclusive jobber?

A. Not to my knowledge. My impression is that we were entitled to have a government jobber, and

(Testimony of Edward Steiger.)

Mr. Phillips was under the strong impression that in order to keep out——

The Court: This is not responsive to what you are asking.

Mr. Rothert: No; it is not.

Q. Do you recall any statement made by Mr. Miller or any communication that he wrote in written form related to Mr. Phillips' arrangement with Hunt's between the 1st of September—the 1st of January '52 and the 1st of January '53?

A. Only through Mr. Flynn.

Q. Only what Mr. Flynn told you?

A. Yes.

Q. Coming back to a previous question, in this meeting where the termination was mentioned, you say that Mr. Miller made a statement to Mr. Phillips about the 1st of May, 1953. In that reference to the Schwarz Company did Mr. Miller state that Schwarz Company was going to represent Hunt Foods on all of their sales to the military throughout the country and not confined just to northern California?

A. I don't remember exactly what Mr. Miller would have said [391] about any other district than this.

Q. It isn't what he would have said; it is what you remember of what he said if anything.

A. I beg pardon?

Q. I didn't ask you what he would have said, but what you remember that he did say.

A. Well, I think Mr. Miller said that Francois

(Testimony of Edward Steiger.)

Schwarz would represent Hunt Foods nationally. I believe that is what was said.

Q. And when he said that they thought they would improve or get more business in selling to the military through Schwarz Company, he said they would get more business nationally on the sales to the military through the Schwarz Company, didn't he? A. I don't recall that.

Q. Did your department send reports of the volume of business that Mr. Phillips did down to Fullerton? A. No; we didn't.

Q. You didn't make any reports to Mr. Miller, for instance, as to what amount of business Phillips was doing?

A. Mr. Flynn may have made those reports.

Q. You don't know whether he did or not?

A. No, sir; I don't.

Mr. Rothert: I have no further questions.

The Court: We will take a brief recess at this time. [392]

(Recess.)

Cross-Examination

By Mr. Cullinan:

Q. Did Mr. Phillips at any meeting where you were present state any conditions that he would require if he were to take on the jobbing assignment?

A. No.

Q. During the time that Mr. Phillips was acting for Hunt Foods, did you have any occasion to call at

(Testimony of Edward Steiger.)

his office? A. Yes.

Q. How many times did you call at Mr. Phillips' office? A. In person? You mean in person?

Q. That is about the only way you can call.

A. Oh, I would say at least four or five times.

Q. When was the first time?

A. The first time was about, oh, five months after we were under way with this operation.

Q. And when was the last time?

A. I don't recall the date; but I am sure the last time was just prior to the time of the assignment of the accounts receivable.

Q. What was said at that first meeting? You went to Mr. Phillips' office. Was Mr. Phillips there?

A. Yes.

Q. And what was said at that meeting, do you recall?

A. The reason for my going was to have a talk with Mr. [393] Phillips to convey to him the credit department's insistence that he pay past due invoices and bring the account in order.

Q. When was the next meeting after this? Five months after you started, that would have been somewhere, say, in May, 1952, somewhere around in there, roughly. When was the next meeting?

A. Oh, the next meeting might have been perhaps one or two months later, on much the same subject.

Q. And when was the next meeting after that?

A. I believe in the third meeting Mr. Phillips wasn't there.

(Testimony of Edward Steiger.)

Q. So you didn't get to talk to him?

A. No; I talked to a person in his office.

Q. And when was the next visit to his office after that?

A. I believe the next meeting was just before the assignment of the account where much pressure was being brought on me by the credit department to be sure and convey again——

The Court: Of course that is not responsive to the question. All you were asked was when the next meeting was, and you say it was at the time the assignment of the accounts receivable was made.

A. Just before.

The Court: Just before?

Q. (By Mr. Cullinan): What was said at that time? Mr. Phillips was present at that time?

A. Mr. Phillips was present at that time and we again talked [394] about credit.

Q. What did you say about it?

A. What did I say?

Q. What did you say and what did he say?

A. He promised to send us a check; he had been busy, out of town, and so on and so forth.

Q. And what did you say?

A. I conveyed the dire necessity that payment must be made and that I would have to report to the credit department the results of the meeting.

Q. Was there any discussion at that meeting about deliveries of merchandise?

A. At that meeting I don't recall there was; no.

(Testimony of Edward Steiger.)

Q. At any of these meetings that you had with Mr. Phillips in his office, was there any discussion about delivery of merchandise?

A. At one meeting there was a discussion of an error in our delivery to Travis Air Force Base.

Q. I meant with respect to future deliveries of merchandise. Was there any discussion at any of these meetings there with Mr. Phillips about future deliveries of merchandise?

A. Only that our credit department felt that they had gone just about as far as they could approving orders for delivery to the commissaries; in other words, to either pay up, or that was it. [395]

Q. What was that?

A. That he either pay up, bring the account to date, or the credit department couldn't approve any more orders.

Q. Now, coming down to the termination meeting, where Mr. Miller was present, I think you testified on your direct that at that meeting Mr. Phillips was apprised that he would no longer be selling to the commissaries for Hunt's. Now, at that meeting did Mr. Phillips make any reference to a contract of any kind with Hunt's? A. No.

Q. He didn't discuss or mention any contract at that time?

Mr. Rothert: I will object to that on the ground it is asked and answered and leading and suggestive.

The Court: He has answered the question.

Mr. Cullinan: That is all.

The Court: Is that all?

(Testimony of Edward Steiger.)

Mr. Rothert: No; I have a few questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. These discussions you had with Mr. Phillips in his office about credit apparently all took place before these accounts receivable were turned over by Mr. Phillips? A. Yes.

Q. And after the accounts receivable were assigned over by Mr. Phillips you didn't call on him about that subject after [396] that, did you?

A. Only by telephone.

Q. But these four meetings that you had where you talked to Mr. Phillips in his office were all before the accounts receivable were assigned?

A. Yes.

Q. Was there any particular reason why you went over to see him about it rather than call him by phone? A. It was of such urgency.

Q. I see. After that accounts receivable assignment the matter wasn't urgent enough to require you to go over and see him in his office; is that a fair statement?

A. That is a difficult question to answer.

Q. All right; in any event you didn't go over to talk to him; whatever talking you did you talked by phone?

A. I wasn't instructed to go over to see him.

The Court: That still isn't an answer to the question. Are the conversations you had with him

(Testimony of Edward Steiger.)

after that time, if any, by telephone and not in person; is that right?

A. Yes, your Honor.

Q. (By Mr. Rothert): The accounts receivable assignment was in about late May, 1952, so therefore would it be correct to say that these visits when you went over to his office were between the time when he started on the 1st of December, '51, and some time in May of '52? [397]

A. Yes.

Q. Now, by the time you wrote the letter of April 16, 1953, his account with your company was improved over what it was at the time of the assignment, was it not?

Mr. Cullinan: Well, if your Honor please, there is no showing that this particular witness knows the amounts owed at any particular time. All he said is that he was in arrears.

The Court: Well, I think the document really speaks for itself, doesn't it?

Mr. Rothert: It probably does, your Honor.

Q. When the credit department contacted you and asked you to go over and see Mr. Phillips, didn't they give you a statement of the amounts that Phillips owed and how long they had been owed?

A. At times they would have; other times, no.

Q. Well, would it be fair to say that this fourth meeting in Mr. Phillips' office was the last time that you told him that if he didn't pay or straighten out his account that maybe he couldn't buy any more Hunt's products?

A. That is the last meeting; yes.

(Testimony of Edward Steiger.)

Q. And that is the last time you said that to him, whether it was in person or over the telephone or any other way?

A. No; it wasn't the last time.

Q. When was the last time you told him that if he didn't make some additional payments he wouldn't be able to buy any [398] more Hunt's products?

A. When—it would have been over the telephone, and it would have been subsequent to May; and what date I don't recall.

Q. Well, would it have been in 1952?

A. Yes; it would have been in 1952.

Q. Would it have been in the summer or fall? Can you give us any estimate of when it was, how soon after May?

A. Some time in the summer.

Q. Of '52?

A. Of '52.

Q. Then it would be fair to say that all through the fall of 1952 and up to April, the end of April of 1953, you at no time told Mr. Phillips that if he didn't make additional payments or faster payments on his account, he might not be able to buy Hunt products?

A. I think after the summer of '52 I didn't handle the credit and I wouldn't have—I wouldn't have made that statement.

Q. You mean was there some change in the company's operations that took out of your hands some credit matters that formerly had been in them?

A. Well, the seriousness of the accounts—the assignment of the accounts receivable necessitated

(Testimony of Edward Steiger.)

our office manager making trips to Wellington Phillips' office. [399]

Q. Who was that? A. Mr. Jack Lentz.

Q. And during the period that he made trips to Mr. Phillips' office you also called Mr. Phillips on the phone about it? A. On one occasion.

Q. At about the early part of 1953, before you wrote the letter of April 16th which comments on his account at that time, had you talked to Mr. Phillips about it? A. I'm sure I must have.

Q. Now, you were asked about the statement, about the word "exclusive." Is this what you told Mr. Phillips: that that meant that no other salesman or other representative selling Hunt's products could sell to those commissaries?

A. At that time; yes.

Q. Yes. Now, you knew at the time of these discussions in '51 that Mr. Phillips was experienced in the canned food business, didn't you?

A. Yes.

Q. You knew that he was experienced on sales to the government—military sales to the government? A. He told me so.

Mr. Rothert: I have no further questions.

Q. (By The Court): Mr. Steiger, let me ask you this: These meetings that you attended at which Phillips and Flynn were present when the proposed arrangement, whatever it was, between [400] Phillips and Hunt was discussed, was there any mention of any time for which the arrangement was to continue by anyone?

(Testimony of Edward Steiger.)

A. No, your Honor; no mention of any time.

Q. So that so far as you know it was an arrangement that had no time mentioned?

A. That is right, your Honor.

Q. As far as you heard, I mean.

A. Well, I was there most of the time.

Mr. Cullinan: One question. When did Mr. Flynn die? A. December, 1953.

Mr. Cullinan: That is all.

Q. (By Mr. Rothert): One question. Didn't your duties require you to be out of the office calling on the trade or in business quite a bit of the time?

A. They would normally necessitate that, but Mr. Flynn wasn't too well and I operated as sort of an acting district manager as well as assistant district manager, so that I would run the office, keep the operation fluid and occasionally go out for a few minutes, maybe an hour or two, and come back in.

Q. In 1951, and from August on, how much of the time were you away from the office?

Mr. Cullinan: What was that question?

(Question read.)

Mr. Cullinan: What do you mean by the time—the time in hours of the day? [401]

Mr. Rothert: Just tell us in his own words, the percentage.

Mr. Cullinan: If your Honor please, that question isn't clear to me as to what he is asking for.

(Testimony of Edward Steiger.)

Q. (By Mr. Rothert): What portion of the time of normal business hours from the 1st of August to the end of the year, 1951, would you say you were away from the office and not in it?

A. During that year I would have been away from the office only 20 per cent of the time.

Q. Did you have accounts in the Sacramento Valley that you called on?

A. Yes. No; the company had accounts in Sacramento on whom I would call.

Q. (By The Court): Were you away from the office in your duties as district sales manager visiting various places about 20 per cent of the time?

A. Yes.

The Court: Doesn't that answer the question?

Mr. Rothert: I have no further questions. [402]

The Court: But first you want to examine him?

Mr. Cullinan: Yes, your Honor.

Recross-Examination

By Mr. Cullinan:

Q. Mr. Steiger, starting with the meetings that Mr. Flynn and Mr. Phillips had, were you at all of the meetings that Mr. Flynn and Mr. Phillips had in September of 1951? A. Yes.

Mr. Rothert: I am going to object on the ground it calls for his conclusion. He wouldn't—how would he know there were meetings at times he wasn't there? The witness says he was there on a lot of

(Testimony of Edward Steiger.)

them, a number, but whether he was at all of them or not would be his conclusion.

The Court: Well, that's correct, technically correct. A man can't testify that he was at all meetings without knowing what other meetings there were.

Q. (By Mr. Cullinan): You attended meetings with Mr. Flynn where Mr. Flynn and Mr. Phillips were present? A. Yes.

Q. And those meetings were held at your office?

A. In my office.

Q. Or Mr. Flynn's office? A. In my office.

Q. The meetings were held in your office. Now, were you present when Mr. Phillips was discussing this, the idea of a [403] jobber arrangement with Hunt's? A. Yes.

Q. How many meetings were you present when that was being discussed?

A. Probably two or three.

Q. Two or three. On direct examination you were asked if at any of those meetings Mr. Phillips mentioned that it would take a year or two, or for a year or two he would have to sell at a small profit or virtually cost. At any of these meetings was there any discussion by Mr. Phillips relative to whether for a year or so in handling this jobber arrangement with Hunt's Foods, the jobber would be selling at virtually cost or at a small profit?

A. There was some discussion on that subject; yes.

(Testimony of Edward Steiger.)

Q. Was that at more than one meeting or just the one meeting?

A. I think each time that Mr. Phillips met with Mr. Flynn and myself he brought up that subject.

Q. Was Mr. Mears present at any meeting when you were present? A. Yes.

Q. At any meeting that you were present was there any discussion of the duration of a jobbing arrangement?

A. Any—you mean specific time?

Q. Yes. [404]

A. Not to my—no; there wasn't.

Q. What was that? A. No.

Q. Now, I hand you a letter dated November 26, 1951, which is to Mr. Phillips—from Mr. Phillips to you, which is the original of a copy that is in evidence with an attachment to it, enclosed with the letter, and ask—it is addressed to you—ask if you received that attachment.

Mr. Rothert: The attachment is in evidence, too; isn't it?

Mr. Cullinan: Yes; the attachment is in evidence, too.

A. Yes.

Q. (By Mr. Cullinan): Now, on this original of the attachment there are some pencilled marks. Are those your pencilled marks?

A. That's my writing.

Q. And it was from this that the bulletin, which is Exhibit 3, was prepared? A. Yes.

Mr. Cullinan: We would like to introduce this

(Testimony of Edward Steiger.)

in evidence because it shows what Mr. Steiger added to what Mr. Phillips prepared.

The Court: All right. Is there any point to it?

Mr. Cullinan: Well, the bulletin——

The Court: It has already been testified that the form [405] of the bulletin was submitted by Mr. Phillips and some corrections were made, and the form it went out was introduced in evidence.

Mr. Cullinan: All right.

The Court: I think that's clear in the record unless you want to show something else by it.

Mr. Rothert: The comparison of the two will show the changes, I assume.

The Court: If you feel it has some point to that, put it in, counsel. If you wish to put that in, I have no objection.

Mr. Cullinan: I suggest we might substitute the original for the copy that is now marked in evidence. That would save having the letter twice in there.

The Court: Well, I think counsel submitted that one.

Mr. Rothert: I did; yes.

The Court: As the form that went out. There was some testimony with respect to it. That was the form that went out.

Mr. Rothert: And with a copy of that I submitted also Plaintiff's Exhibit 2.

Mr. Cullinan: Plaintiff's Exhibit 2 is the copy of this, which is the original.

The Court: Oh, I see. All right; mark this. Mark this. [406]

(Testimony of Edward Steiger.)

Mr. Cullinan: Substitute one for the other.

The Court: Better mark it in evidence as a separate exhibit number, so the record will be clear.

The Clerk: Defendant's Exhibit AM introduced and filed into evidence.

(Whereupon, document referred to was marked Defendant's Exhibit AM in evidence.)

Q. (By Mr. Cullinan): Did you have any discussion, Mr. Steiger, with Mr. Phillips with respect to the use of the word "exclusive" in this exhibit, Plaintiff's Exhibit 2? A. Yes.

Q. What was the discussion with Mr. Phillips with respect to the use of that word "exclusive"?

A. My instructions primarily were that Mr. Phillips—

Q. No; the discussion between you.

A. I beg your pardon?

Q. What was the discussion between you and Phillips?

A. With regard to the word "exclusive"?

Q. Yes.

A. That the word "exclusive" would mean that no other salesman, ours or other representatives carrying our merchandise, would be able to sell the purchasing and contracting officers of the commissary stores when the word "exclusive" was used.

Q. At any meeting where you were present with Mr. Flynn and [407] Mr. Phillips, was there anything said by Mr. Phillips about withdrawing any capital from his business if he had this account?

(Testimony of Edward Steiger.)

A. No.

Q. When Mr. Phillips mentioned a year or two of selling at a profit or small profit, was anything said by you and Mr. Flynn about that to him?

A. The main topic of our conversation with respect to that was that Mr. Phillips would have to do a good job.

Q. Well, what do you mean by that? What was said when that subject was mentioned? What was said by you or Mr. Flynn?

Mr. Rothert: I think it has been asked and answered.

The Court: Well, anything additional said besides what you have already stated on that particular subject. I think that is what counsel asked.

The Witness: Could you ask that again, please?

Mr. Cullinan: Would you read the question?

(Record read.)

A. Only that we understood with any business at first it might not be profitable until a person gained experience. That's all I recall.

Q. Do you know if that is the usual experience that jobbers——

Mr. Rothert: We will object to that; calls for the opinion and conclusion of the witness. [408]

The Court: Yes; sustained.

Mr. Cullinan: Asked if he knew.

Mr. Rothert: Can't cure a conclusion by asking a person if he knows it.

(Testimony of Edward Steiger.)

The Court: I will sustain the objection to the form of the question. [408-A]

Mr. Cullinan: One further question. Was Mr. Flynn out of the office at any time you were talking with Mr. Phillips and Mr. Miller?

A. No; Mr. Flynn and I both attended all meetings.

Q. But was he there continuously while you were there? A. Continuously.

Mr. Cullinan: No further questions.

Mr. Rothert: No questions.

The Court: That is all.

Mr. Rothert: I would like to call Mr. Miller for a few questions.

LEE MILLER

called as an adverse witness for the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Lee Miller.

Direct Examination

By Mr. Rothert:

Q. In the fall of 1951 you were the division sales manager for Hunt Foods?

A. District divisional sales manager; yes.

Q. District divisional sales manager. And you were the man directly above Mr. Flynn in authority over Mr. Flynn as the head of those district sales?

A. That is correct.

(Testimony of Lee Miller.)

Q. Do you recall when I took your deposition in August of this year in Los Angeles? [409]

A. Yes.

Q. Now, is it true that the only conversations that you can recall with Mr. Phillips in 1951 was when Mr. Reid introduced him to you and you after that had coffee together?

A. That is correct; in 1951.

Q. On one occasion.

A. On the one occasion.

Q. And is it true that you don't recall any details of any discussions about Mr. Phillips' arrangements with the company at that time other than that Mr. Reid told you that he thought Mr. Phillips could do a good job on sales to the commissary stores?

A. Well, that isn't exactly correct. Mr. Phillips at that time stated what he wanted. He stated that he wanted to be an exclusive jobber for us in the Bay Area to the commissaries.

Q. I see. Do you recall what you said in reply to that?

A. Well, I said that was a matter that I was to take up with Mr. Flynn since it was in his area. I also said that if it was all right with Mr. Flynn it would be all right with me.

Q. Any sales that Mr. Phillips would make would be made under Mr. Flynn's supervision, wouldn't they?

A. That is correct.

Q. I will ask you if you gave these answers to these [410] questions in your deposition——

The Court: Well, you can't do that very well,

(Testimony of Lee Miller.)

counsel, unless you want to impeach him in some way.

Mr. Rothert: That is the reason for which I wish to use this portion of it.

The Court: What are you going to do? Are you going to ask him a question about it?

Mr. Cullinan: What page?

Mr. Rothert: Will you read page 6, line 23, to page 8, line 13? Wait. I may want to go a little further than that.

The Court: Mr. Rothert, is it that you want to get into evidence a statement that the witness made in the deposition?

Mr. Rothert: That is right, your Honor.

The Court: Then why don't you ask him the same questions now? Then you might have a basis if he answers differently to impeach him on that ground. That is the proper way to use the deposition.

Mr. Rothert: All right; this will have to be a lengthy question.

The Court: I see what you are trying to get at, but you can't just ask him if he gave those answers to the questions unless you have laid some foundation for it.

Mr. Rothert: I have already laid a foundation for it.

The Court: You will have to ask him some questions to do that. [411]

Q. (By Mr. Rothert): Isn't it true that the only conversation you know you had with Mr. Phillips in

(Testimony of Lee Miller.)

1951 was when Mr. Reid introduced Mr. Phillips to you; that thereafter you walked out of the office and had a cup of coffee and that the only recollection that you have was just over a cup of coffee that Mr. Reid thought Mr. Phillips could do you some good with commissary sales in the Bay Area; that there were no details gone into in your presence to your recollection, and that you recall nothing that Mr. Phillips said in that connection?

A. Mr. Rothert, I have had an hour or two to study that deposition. I certainly did not send Mr. Phillips up to see anybody without going over what he had in mind.

The Court: Just a moment now. You don't want to get into any argument with the lawyer.

The Witness: The thing is I remember more than that.

The Court: Just a moment. All he wants to know is, is that correct what he just stated? Is that what happened? That is what he wants to know.

A. No; I just testified what happened, your Honor.

Q. It isn't a question of what you just testified. He wants to know whether what he has just stated is——

A. Is what I said?

Q. Is correct.

A. That is not—that testimony I gave, but it isn't correct. [412]

Q. He isn't asking you whether you gave that

(Testimony of Lee Miller.)

testimony. He is just asking you as a fact whether that is true or not.

A. That is not fully correct; more happened than was there.

Q. What?

A. More happened than was there at the time I said that.

Q. He is not asking you that. He is just asking you if that is a correct statement.

A. That is a correct——

Q. If you say that it isn't—I will just give you a little education in what the lawyers do to you. If you say that that isn't correct, then he will read to you the answers that you gave in the deposition and say, "Didn't you give that answer in the deposition?"

A. I gave that answer in the deposition.

Q. Is it true or not?

A. It is not wholly true.

Q. (By Mr. Rothert): I think you said that you had had an opportunity to study this deposition.

A. That's right.

Q. Since I asked you the questions?

A. Right.

Q. Before you gave the answers in this deposition you had conferred with Mr. Duniway, had you not?

A. No.

Mr. Cullinan: Well, just a minute. I might [413] explain, you mean just immediately preceding this, or do you mean in preparation for it?

Mr. Rothert: I said before.

(Testimony of Lee Miller.)

Q. At any time before August 23, 1955, at about 10:00 o'clock a.m. when I met you in the offices in Los Angeles, had you conferred with Mr. Ben Duniway, one of the attorneys for Hunt Food Company, about this subject? A. No. [414]

Q. Had anyone asked you questions before that time about what connections you had with Mr. Phillips in 1951?

A. I don't remember. I was told I was going down to give a deposition. I went down; you asked me the questions; I answered the questions. I answered the questions to the best of my ability.

Q. And before you answered my questions you had not answered any questions put to you by Mr. Ben Duniway or anybody else about your relationships with Mr. Phillips in 1951; is that a true statement? A. Not to my knowledge.

Q. Is it your present recollection that you had more than one talk with Mr. Phillips in the fall of 1951?

A. No, it is not. To the best of my knowledge, it was one time I talked to Mr. Phillips.

Q. In the conversation you had with Mr. Phillips, where did that one take place?

A. That took place, I believe, on our way over from my office to a corner coffee shop with Mr. Reid, Mr. Phillips and myself.

Q. In other words, you met Mr. Phillips and you immediately went over to have a cup of coffee together? A. That's right.

Q. Then the discussion was while you were walk-

(Testimony of Lee Miller.)

ing over to the coffee place and over a cup of coffee? [415] A. That is correct.

Q. That is the only conversation you now recall having with Mr. Phillips in 1951?

A. That is correct.

Q. And in that conversation as you now recall it, Mr. Phillips said he would like to act as exclusive jobber on sales to the commissaries in Northern California? A. Correct.

Q. Did he tell you he had talked to Mr. Flynn about it? A. He did not.

Q. Did you tell him he should talk to Mr. Flynn about it?

A. Only that he should discuss it with Mr. Flynn, that is correct.

Q. Did you tell him whatever Mr. Flynn arranged with him it would be all right?

A. If it was all right with Mr. Flynn it was all right with me, that is correct.

The Court: That's what the business men call passing the buck, isn't it? The fellow says it is all right with him if it is all right with the other fellow.

Mr. Rothert: Of course, attorneys do that when they are trying to settle cases, too.

The Court: Is there anything else you want?

Mr. Rothert: Yes, there is, your Honor.

Q. During the time that Mr. Phillips was selling to the [416] commissaries, you didn't get reports from Mr. Flynn or the Hayward office about his sales, did you? A. No, I did not.

(Testimony of Lee Miller.)

Q. You didn't report anything about Mr. Phillips' sales to Mr. Erlanger or people in higher authority, did you? A. No, I did not report it.

Q. The arrangement that Mr. Phillips had as an exclusive jobber selling to the commissary stores in Northern California was the only arrangement that you knew of that your company had in the United States where a jobber—where your salesmen were told not to call on commissary stores because the jobber was calling on them?

A. That is correct.

Q. In your deposition you said you had seen a bulletin that Mr. Flynn had sent out. Is that this, which is Plaintiff's Exhibit 3?

A. May I take a look at that? Yes, that is correct. That is the one that I was somewhat in doubt about that I had seen.

Q. Now, is it true that you did not discuss with Mr. Flynn any details about what arrangements Mr. Flynn was making with Mr. Phillips?

A. That is correct.

Q. And you didn't report to anybody in higher authority, including Mr. Erlanger, anything about details or arrangements [417] that had been made with Mr. Phillips? A. That is correct.

Q. In the early part of 1953 did Mr. Hans Erlanger tell you that he had made arrangements with Francois Schwarz Company to sell military bases on a worldwide basis, and for that reason they were not going to—Mr. Phillips was not going to be able to sell to the commissaries in Northern California?

(Testimony of Lee Miller.)

A. I don't know whether he said he made it or going to make it.

Q. Now, did you attend a meeting in 1953 when you told Mr. Phillips about the termination?

A. That's correct.

Q. Was that about the end of April, 1953?

A. About the 23rd or 24th of April of 1953.

Q. Now, you told him that he was not going to be able to sell to the commissaries any longer?

A. I didn't make that statement.

Q. I mean in substance and effect.

A. No, the statement that I made was that we no longer would have him as our exclusive representative, that we were planning on appointing Francois Schwarz Company on a worldwide basis.

Q. You didn't tell him that he was terminated as a jobber, did you? [418]

A. No, I told him he was terminated as our exclusive representative to sell commissaries. I never told him he couldn't buy and sell Hunt merchandise.

Q. Yes. In that meeting you didn't tell him that a delinquency in his accounts was any reason for his being unable to sell to the commissaries, did you? A. No, I did not.

Q. The subject of Mr. Phillips owing money to the Hunt Foods was not mentioned in that meeting, was it?

A. If you could call a statement I made mentioning—it refers to what Mr. Phillips said to me after I told him he was terminated. At that time

(Testimony of Lee Miller.)

I said, "Well, why don't you pay up?" I mean, you have to get that point—you want me to answer the question as I see it?

Mr. Cullinan: He asked for the conversation; what was said.

The Witness: I see.

Q. (By Mr. Rothert): Now, I asked you, isn't it true that in that meeting there was nothing said about Phillips owing money to Hunt's?

The Court: You already asked him the question, counsel. He answered it.

Mr. Cullinan: He hasn't answered that conversation, your Honor.

The Witness: I did not go into the credit situation of [419] Mr. Phillips at the time of the termination other than to say to Mr. Phillips, when I told him he was terminated and he got all excited about it; he said, "I am going down and tell these fellows this, that," and I said, "Wellington, why don't you just pay up and see what happens? If this organization doesn't do all right, why, you may get a chance to get back with Hunt." That's the only thing I said about it.

Q. (By Mr. Rothert): In the summer of 1952 were you in contact with Mr. Phillips about the possibility of Mr. Phillips' organization selling Hunt's products overseas to military bases overseas?

A. Not to my knowledge. The summer of 1952?

Q. Yes.

A. Not to my knowledge, no.

(Testimony of Lee Miller.)

The Court: Well, counsel, if you are not going to finish your examination——

Mr. Rothert: I am almost through with this witness.

The Court: What?

Mr. Rothert: I have just one or two questions of this witness.

The Court: Well, the other counsel—you have other witnesses?

Mr. Rothert: I am sure that he does.

The Court: You have another witness or will you be through? [420]

Mr. Rothert: I will be through except I might have two or three questions of Mr. Phillips on rebuttal.

The Court: You said you have one or more?

Mr. Cullinan: Yes, your Honor. I will have one witness that will take a little time.

The Court: Well, then, I see no point in pushing you gentlemen today. I know I have had a long day, had a great many things this morning you gentlemen didn't participate in. I think perhaps we better take a recess until tomorrow at 10:00.

Mr. Cullinan: All right.

Mr. Rothert: All right.

(Thereupon, an adjournment was taken to tomorrow, Friday, December 2, 1955, at 10:00 o'clock a.m.) [421]

December 2, 1955—10:00 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Cullinan: Ready.

Mr. Rothert: Ready.

The Court: Proceed, gentlemen.

Mr. Rothert: I think Mr. Miller was on the stand.

LEE MILLER

called on behalf of the plaintiff; previously sworn.

The Court: Have you concluded the direct?

Mr. Rothert: I have just one question that might lead to another one.

Q. Mr. Miller, in the summer of 1952, weren't you in contact with Mr. Phillips about a proposition that he be authorized to sell Hunt's products to overseas commissaries and PX's?

A. I have no recollection of that at all.

Q. I show you a copy of a letter of July 28, 1952, addressed to Hunt Foods, Inc., attention Mr. Miller, sales manager, in the name of Wellington Phillips Company, L. W. Phillips, as the signature, and ask you if you remember receiving that letter.

A. I have no recollection of receiving this letter at all.

Q. So the letter doesn't therefore refresh your recollection that you were in contact with Mr. Miller about overseas—— [423]

A. Mr. Phillips, no.

Q. ——and PX bases.

A. No.

(Testimony of Lee Miller.)

Q. At this time in July of 1952 Mr. Reid had left Hunt Foods, hadn't he?

A. Mr. Reid had left around the early part of July in '52; that is correct.

Q. At that time did your duties, then, encompass any of the overseas bases?

A. I was export manager when Mr. Reid left. I was export manager, that is correct.

Mr. Rothert: Could I have this letter marked for identification, your Honor, the letter of July 28, 1953, addressed to Hunt Foods, attention Mr. Miller?

(Whereupon, letter of July 28, 1953, was marked Plaintiff's Exhibit No. 10 for identification.)

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Miller, on your direct yesterday you were asked if you had talked with Mr. Duniway at any time prior to the taking of your deposition. I think you answered no. Did you talk with Mr. Duniway prior to the taking of your deposition?

A. Yes. [424]

Q. So that answer was incorrect. Now, will you explain to the Court how you happened to give an incorrect answer?

A. Well, my interpretation of the question Mr. Rothert asked me was had I had a conversation con-

(Testimony of Lee Miller.)

cerning my relationship with Mr. Phillips. I answered no. Mr. Duniway did go over the correspondence that we had in our file before I came down for the deposition and I had—he had had me review the correspondence, that is true.

Q. You had reviewed the correspondence and talked with Mr. Duniway about that correspondence?

A. That is correct, but not the specific point.

Q. That was just prior to the moment or the time of taking of the deposition?

A. That is correct.

Q. You hadn't talked with Mr. Duniway prior to that date? A. I beg your pardon?

Q. You had not talked with Mr. Duniway prior to that date of the taking of the deposition?

A. I don't know whether it was prior or not. I talked with Mr. Duniway just long enough to go over the paper work that we had in the file. That could have been that morning.

Q. Prior to that morning—

A. No, no, not prior to that.

Q. Prior to that morning you hadn't talked with Mr. Duniway about the case? [425] A. No.

Q. What you had done in preparation for that deposition was to read through the file of correspondence?

A. That is correct. That is correct.

Q. In the conversation with Mr. Phillips that you had testified to, was there any discussion of any period of time that Mr. Phillips might want to rep-

(Testimony of Lee Miller.)

resent Hunt Foods? A. No.

Q. I think you testified that your suggestion was that he go up and see Mr. Flynn; is that correct?

Mr. Rothert: I am going to object upon the ground that it is leading and suggestive.

Mr. Cullinan: I am asking him if that is his testimony.

A. That is correct.

Mr. Rothert: Same objection.

The Court: All you are doing is asking him to repeat something.

Mr. Cullinan: Plaintiff's Exhibit 4—I think it is 4, the copy of a letter of March 15th——

The Court: It it is 6.

Q. (By Mr. Cullinan): I show you Plaintiff's Exhibit 6, a copy of a letter purporting to be from Mr. Phillips to you dated March 15, 1953, and I will ask you if you ever received that letter.

A. I have never seen this before. I saw, I would say, a [426] copy of this two or three weeks ago or something purporting to be a copy of this, but I never received this letter.

Q. When did you first see what purports to be a copy of this letter?

The Court: He just said two or three weeks ago.

A. Two or three weeks ago when it was brought in—a copy brought in to my office.

Q. (By Mr. Cullinan): I hand you Defendant's Exhibit H, which is a letter from Mr. Phillip's to you dated April 15, 1953.

A. I have seen this one.

(Testimony of Lee Miller.)

Q. You received that letter? A. Yes, sir.

Q. Did you reply to that letter?

A. I went up, replied personally to the letter, rather than answering the letter.

Q. You went up—"up" being to where?

A. Up to Hayward, and the termination came following that letter.

Q. You went up to meet Mr. Phillips at Hayward? A. That is correct.

Q. And you did meet, then, with Mr. Phillips at Hayward and Mr. Steiger was present?

A. That is right.

Q. And that was the time of the termination that you [427] testified about?

A. That is correct.

Q. Now, when you told Mr. Phillips that you were no longer selling to him as a jobber to commissaries——

Mr. Rothert: I am going to object to that on the ground that he didn't testify to that. He said he told Mr. Phillips he couldn't sell to the commissaries, but he didn't tell Mr. Phillips that he could no longer buy products as a jobber.

Q. (By Mr. Cullinan): When you told him that he could no longer sell to the commissaries, did Mr. Phillips make any reference to the letter, a copy of which was shown to you, Plaintiff's Exhibit 6, dated March 15, 1953?

A. He made no reference to any such letter.

Q. He at no time during that meeting at Hayward made any reference to this letter?

(Testimony of Lee Miller.)

A. No, he did not.

Q. Have you ever received any communication, orally or in writing, from Mr. Phillips, regarding this Exhibit 6, the letter—copy of letter dated March 15, 1953?

A. I have not.

Q. Was that meeting the last meeting that you had with Mr. Phillips?

A. That is correct. I left the company two months later.

Q. You left the company two months later? [428]

A. I didn't talk with Mr. Phillips during those two months nor did I receive correspondence from him. [429]

Q. There was no communication, orally or in writing, between you and Mr. Phillips subsequent to this meeting in Hayward?

Mr. Rothert: I think that is a leading question.

The Court: He has answered it already.

Mr. Rothert: It is repetitious.

Mr. Cullinan: That is all.

Mr. Rothert: I have two or three questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. Mr. Miller, when you reviewed the correspondence with Mr. Duniway just prior to the deposition in August of this year, you saw no letters or copies of letters either from Mr. Phillips to you or from you to Mr. Phillips; isn't that true?

(Testimony of Lee Miller.)

A. No, that is not true. I saw the letter dated April 16th, and I saw the announcement that Mr. Flynn sent out to the commissaries. At the time of the deposition I was a bit confused about that, whether it went—but I saw those two. That's all I recall seeing are those two.

Q. Had you gone through your company files prior to the time of the deposition to refresh your recollection as to the Phillips matter before I questioned you in the deposition? A. Yes, I had.

Q. And up to the time of the deposition, isn't it true that [429] you didn't find anything in the company's files about the Phillips matter?

A. No, it is not true. I found the letter of the 16th.

Mr. Cullinan: That question is indefinite. Anything about the Phillips matter would include invoices or any number of things. I think the question can't be answered unless it is more particularized.

Mr. Rothert: All right.

Q. Isn't it true that at the time of the deposition you could not recall finding any copies of any letters that you wrote to Mr. Phillips or any letters you received from Mr. Phillips? A. No.

Q. I will ask you if you didn't give these answers to these questions in the deposition—I am referring to page 27, lines 2 to 23:

“Q. Have you gone through any of your company files to refresh your recollection as to the events during this period?

“A. Well, it seems to me that—I don't know.

(Testimony of Lee Miller.)

whether it was six months ago or a year ago or some time I went through them to try to refresh my memory on this. It seems to me this isn't the first time this has come up, I mean, where I seem to be in it somewhere, and some time ago, whenever that was I [430] don't remember—I looked around to see what I could find and I just didn't find anything that would come to me now that I found something. Let's put it that way.

“Q. You mean you don't recall finding any copies of letters you wrote him or any letters you received from Mr. Phillips?

“A. No, not that I could say that I found; I mean, I wouldn't know what it was.

“Q. Do you recall whether there was any separate file kept for Mr. Phillips' account that you examined?

“A. No, not to my knowledge, because I was looking through all kinds of files, as I remember, trying to find something and I couldn't find anything.”

You gave those answers on your deposition, didn't you, Mr. Miller?

A. That is correct; I gave those answers.

Q. You testified this morning that on this very same morning that I asked you these questions you had reviewed correspondence with Mr. Duniway?

A. That is correct.

Q. Is it your testimony that in that correspondence you reviewed with Mr. Duniway there was a

(Testimony of Lee Miller.)

copy of a letter of April 16th—15th, from Mr. Phillips to you?

A. After going over that and taking due consideration, [431] there was one other that I remember that was in that group, and that was a letter that I also wrote to Mr. Groom confirming what I had done in the termination of Mr. Phillips.

Q. The question didn't ask you about any correspondence with anyone other than Mr. Phillips.

A. I see.

Q. But is it your testimony this morning—

A. It is my testimony that—

Q. —that on that very same morning you had seen and read the letter of April 15, 1953, from Mr. Phillips to you?

A. I had apparently read that letter. Despite what I apparently said there, I have seen that letter.

Q. When you say you had apparently read that letter—

A. I have read that letter.

Q. Had you read it that very same morning, on August 23, 1955?

A. I had seen it, yes.

Q. Then you completely forgot it in answering this question?

A. That is correct. I must have forgotten it, because I had seen it.

Q. Where is the letter that you saw? I will withdraw that. Is this Defendant's Exhibit H—

The Court: It is the same as Plaintiff's Exhibit 6.

Q. (By Mr. Rothert): Is Defendant's Exhibit

(Testimony of Lee Miller.)

H the one [432] that you saw, and I call your attention to the handwritten note on the bottom of the second page—that you saw on that very morning of your deposition?

A. Well, it was either this letter or a copy of this letter. I can't tell whether it was his handwriting on the bottom. It is also marked by the fact that it said 1853 instead of 1953. That is another reason, and I remember at the time I called that to our attention.

Q. You didn't remember that at the time I asked you the questions in the deposition?

A. That is correct; I didn't.

Mr. Rothert: Mr. Cullinan, may I ask you, does this purport to be the letter that Mr. Miller received or that Mr. Steiger received?

Mr. Cullinan: I don't know, Mr. Rothert. You and I sat down with a lot of correspondence from both parties and sorted it out and had copies photostated of those that we did not have, and I don't know whether——

Mr. Rothert: And I furnished you with a copy of this at the time and I wrote you a letter confirming the fact, and you have since obtained this letter; is that true—this particular copy from Mr. Steiger?

Mr. Cullinan: No, that letter we have. I am pretty sure we had that letter.

Mr. Rothert: Well, I will let the letter speak for [433] itself.

Q. At the time you talked to Mr. Duniway on

(Testimony of Lee Miller.)

the matter of August 23, 1955, did you remember having received this letter of April 15th, Defendant's Exhibit H, prior to that day?

A. Yes, the letter of April 15th I received.

Q. As I understand it, you don't recall whether the one that you saw with Mr. Duniway had this note——

A. Yes.

Q. ——Ed Steiger. Dear Ed, For your information (written in pencil).

A. No, I don't. I don't know whether I saw a copy of that or that one.

Q. When you say a copy of that, do you mean a copy of this one with the note to Ed Steiger on it or a copy without the note to Ed Steiger?

A. The portion to Ed Steiger, I don't remember that last, whether that was on the letter I saw.

Q. Can you produce a copy of that letter that you received without the note to Ed Steiger on it?

A. That I can't tell you. All the records were turned over a long time ago in the case. I don't know.

Q. Did you see any copy of a letter dated July 28, 1952, when you reviewed the correspondence?

A. No, I did not.

Q. When you went up to Hayward and had the meeting with [434] Mr. Phillips in which the termination took place, what did you do to arrange to have Mr. Phillips come to the meeting?

A. I asked Mr. Steiger to call Mr. Phillips and tell him I would like to talke with him.

Q. In that meeting Mr. Phillips didn't refer to

(Testimony of Lee Miller.)

his letter of April 15th, either, did he, Defendant's Exhibit H?

A. Mr. Phillips made no reference to any letter.

Mr. Cullinan: That is 1953 in that last question.

Mr. Rothert: I amend it to 1953.

I have no further questions.

Recross-Examination

By Mr. Cullinan:

Q. Mr. Miller, you have gone through the files of the company since the deposition; at least you have gone through the correspondence file and the files of the company since your deposition, have you not? A. That is correct.

Q. Have you at any time found the letter or a copy of the letter of March 15, 1953?

A. No, sir.

Mr. Cullinan: That is all.

Further Redirect Examination

By Mr. Rothert:

Q. Were those files that you went through since the deposition the same ones you went through before the deposition?

A. That is correct. They are up in the loft. [435]

Q. At the time of your deposition you had not reviewed any files from the Hayward office, had you? A. No, I had not.

Q. The files that you reviewed when you were

(Testimony of Lee Miller.)

with Mr. Duniway, did he have them with him when you met or did you have them with you?

A. He had them with him.

Q. Did he identify those files as to where they had come from? A. No.

Q. Did he say these were company files he had?

A. He just asked me to look them over; he didn't say where they came from.

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

Mr. Rothert: That is all of the plaintiff's case, your Honor, except for a very small matter in rebuttal.

The Court: The plaintiff rests, then?

Mr. Rothert: Yes, your Honor.

Mr. Cullinan: At this time, if your Honor, we, on behalf of the defendant, would move for a non-suit against the plaintiff in this action on the following grounds: First——

The Court: It is a motion for dismissal of the complaint? [436]

Mr. Cullinan: Yes.

The Court: In the Federal Court it is not a non-suit.

Mr. Cullinan: There is no proof in this case that Mr. Flynn or Mr. Miller or whoever made the alleged contract claimed by plaintiff had any authority in writing to enter into a contract which was to last more than one year, and under the rule set forth in California Civil Code Section 2309,

such an authority in writing is necessary and must be proved by the plaintiff.

In the case of *Elkwood v. Moore*, decided by the Ninth Circuit, 97 Fed. 2d 402, at 408, a case somewhat similar to this in that a manager of the company had entered into a contract which the statute of frauds would have required to be in writing, the court held that there was no proof by the plaintiff in this case that the manager had written authority from the officers of the company to enter into such a contract.

In the case of *Anderson v. Standard Lumber Company*, 64 Cal. App. 410—

The Court: How could the defendant raise that point here? They acted, conducted relationships for a considerable period of time.

Mr. Cullinan: But not a relationship under a contract which would be for a period of ten years, five years or any other period. The only relationship they had was they were [437] selling goods to the plaintiff.

The Court: You don't mean to say, do you, that when two business men enter into a contract that they don't put in writing, on one side an officer of the corporation can say he has no authority for the company, but for two years or some substantial period of time, the parties act under the contract—they act under some contract; that thereafter because the man didn't have authority in writing to enter into it, that the man on the other side, assuming a breach, would not have any right of action?

Mr. Cullinan: Yes, your Honor, because the plaintiff here never dealt with an officer of Hunt Foods.

The officers of Hunt Foods, we may assume, knew that we were selling to the plaintiff, as we were selling to the plaintiff for resale; but as in the *Anderson v. Standard Lumber* case just cited, the Court points out that the corporation officers had no knowledge of the alleged terms of the contract even though they did know that the plaintiff had been employed. In other words, they say that knowing that they are employed, or, in this case, knowing that we are selling to the plaintiff, does not suggest any knowledge of the alleged terms, the terms alleged by the plaintiff in this case. And in that case they held that there was a failure of proof because the plaintiff had not established that officers of the company not only knew that he had been employed but knew the [438] alleged terms. According to the record, there is no knowledge by any officer of Hunt Foods that the plaintiff was operating under the contract that he alleged, which would be a contract beyond the period required under the statute of frauds to be acknowledged in writing.

The Court: Well, assuming that the evidence does not show that the contract was entered into for a period of a number of years as alleged—assuming it does not show that, there is evidence, however, that there was a contract entered into which no time was specified, according to the testimony——

Mr. Cullinan: Yes.

The Court: Now, would you say that if the parties acted under a contract of that nature, because that isn't in writing, then in the event of an alleged breach there could be no recourse and recovery would be debarred because there was no written authority from an officer of the corporation?

Mr. Cullinan: Yes, your Honor; if the contract was going to last for more than a year, the authority of the man who made the contract for Hunt's had to be in writing. Now, they may have had a contract to buy and sell, which they did. If that contract had lasted for a year, that still doesn't prevent the defendant from requiring the [439] plaintiff to show that if he wants to claim that that contract was to last for more than a year—for instance, in *Seymour v. Oldrich*, the principals there ratified and affirmed the oral contract of employment, but did so in ignorance of any alleged ten-year duration provision, their understanding being it was a contract from month to month. And they held that since there was no written authority to enter into the contract, the plaintiff was claiming, the plaintiff was therefore barred from recovery.

The Court: I don't see that that *Seymour v. Oldrich* applies, except on the basis of the general principle for which the case is so often quoted, that it has any particular relationship to the facts of this case. We are now looking at it only from the point of view of the motion to dismiss from the plaintiff's evidence.

Mr. Cullinan: Yes, your Honor.

The Court: Taking the evidence even most favorable to the defendant, it would appear at this point that there was an arrangement made for which no time was specified but which continued apparently for over a year.

Mr. Cullinan: Yes. So they had an arrangement for a period December, '51, to April, '53. That is all the evidence shows at this point. They had an arrangement that lasted that long. But there is no authority.

The Court: Suppose the plaintiff overpaid [440] the defendant during the second year of the operation and he had some money coming from the defendant; he wouldn't have a cause of action——

Mr. Cullinan: He would have a common count.

The Court: ——he wouldn't have a cause of action because the terms of the contract were not approved or authorized, or the man who made the deal was not authorized in writing to make it by an officer of the corporation?

Mr. Cullinan: Well, he would have a common count claim against the company.

The Court: Well, he would have a cause of action.

Mr. Cullinan: Yes, but not on a contract.

The Court: Well, have you some evidence to present in the case? You said something about having one witness.

Mr. Cullinan: Yes, I have some witnesses. I had further grounds on the motion for dismissal. Maybe I just could state them——

The Court: This case has been dragging, gentle-

men, and there has been a lot of repetition. I don't want to be critical again, but I have listened very patiently to many, many repetitious examinations, and I want to get through with it.

Any legal point that you want to make, you can make at the conclusion of the evidence. Let's get whatever evidence you have, and you may make your motion at the end of the [441] case with the same force and effect as if you made it now, and if there isn't a legal ground for recovery, it would be just as good when all the evidence is in as it is now. I would like you to get this case concluded, so far as the evidence is concerned, and then I will be very glad to hear whatever legal points you have to make in support of any motion you wish to make.

Mr. Cullinan: It is your Honor's desire, then, that I not even state the additional grounds?

The Court: I am not wanting to cut you off. All I am indicating is that whatever motion you want to make, the Court will reserve the right for you to make it on any grounds that you want to make it.

Mr. Cullinan: All right, your Honor. Thank you.

Mr. Rothert: I will reserve any answer to his argument that he has made up to this time until a later time, your Honor.

Mr. Cullinan: Mr. Church.

JOHN L. CHURCH

called as a witness on behalf of the defendant;
sworn.

The Clerk: Will you please state your name to the Court?

The Witness: John L. Church.

Direct Examination

By Mr. Cullinan:

Q. Mr. Church, would you state your [442] position with Hunt Foods?

A. I am the general credit manager.

Q. Were you the general credit manager since the year 1951? A. That is correct.

Q. And are you familiar with the record of accounts of sales to and payments by Wellington Phillips Company? A. I am.

Q. Those records are under your control?

A. Yes.

Q. When did you first meet Mr. Phillips?

A. It was in the summer of 1951; I believe it was July.

Q. Did that meeting last very long?

A. No, it was a rather short meeting.

Q. Was there any business discussed at that meeting? A. There was.

Q. What was discussed at that meeting?

A. Well, Mr. Reid introduced me to Mr. Phillips and stated that Mr. Phillips wanted to purchase Hunt products, to be a wholesale distributor to the commissary as well as on his own account, and

(Testimony of John L. Church.)

would I give him a line of credit. I told Mr. Reid and Mr. Phillips I had no credit file on him; that I would build my file up; in the meantime he was to submit a credit application and figures.

Q. And that was what was discussed at that meeting?

A. That was the sum and substance. [443]

Q. When did you next meet with Mr. Phillips?

A. I think approximately three or four weeks later.

Q. Would that be in September of '51?

A. Yes.

Q. So in September, 1951, you met with Mr. Phillips and that was down at Fullerton, was it not?

A. Both meetings were at Fullerton.

Q. Will you tell us what was said at that meeting?

A. Well, I think at that time Mr. Phillips had submitted his first order; I had started my credit file——

The Court: You were just asked to state the conversation.

A. At that time he had not yet submitted the figures that he send them to me. It was a very brief meeting. [444]

Q. (By Mr. Cullinan): Now, did you discuss—did you have a discussion about terms of payment at that meeting?

A. Yes, there was. Mr. Phillips explained that in dealing with the commissaries he would probably need a line of credit bigger than his capital

(Testimony of John L. Church.)

would justify, and would I go along. I said our terms were two per cent ten days, and that's all the terms I could give him; he had to pay within those terms.

Q. What did Mr. Phillips say?

A. Nothing particular I can remember other than he acquiesced to them.

Q. Other than what?

A. Other than to agree to them.

Q. What were your terms again to him?

A. Two per cent ten days.

Mr. Rothert: Objected to as asked and answered.

Q. (By Mr. Cullinan): Was there any discussion as to any extended time of payment at that meeting?

A. Well, in connection with the request for terms, Mr. Phillips stated he was doing business with firms in the San Francisco area, Kingan was mentioned as one of them—where he sold, for their account, and he paid them when he got paid. I told him I couldn't accept any such arrangement.

Q. Was there any discussion about a line of credit to him at that meeting? [445]

A. Only generally. Mr. Phillips was asking for a line of credit commensurate with the business he could do, and I told him that I could not agree to that until I had sufficient figures to justify such credit.

Q. Did you discuss with him any limit of credit at that time? A. No, I did not.

(Testimony of John L. Church.)

Q. Let me hand you——

Mr. Rothert: May I see it, please? (Passing papers.)

Q. (By Mr. Cullinan): I hand you a six-page document entitled, "Accounts Receivable," in the name of Wellington Phillips, and ask you what that document is?

A. These are the original ledger cards of Wellington Phillips Company as taken from our accounts receivable files.

Q. It covers the whole period that Wellington Phillips was handling the Hunt products?

A. Yes. It covers any dealings which we have had with Wellington Phillips.

Mr. Cullinan: We would like to introduce this in evidence as our next in order, and ask the right to substitute a photostatic copy of the original. No objection?

Mr. Rothert: I assume they were prepared under his supervision and direction.

Mr. Cullinan: Yes. [446]

Q. These were prepared under your supervision and direction and under your control, are they not, these accounts receivable?

A. These accounts receivable were and the photostat was.

Mr. Cullinan: We will offer the photostat in evidence as our next exhibit.

The Clerk: Defendant's Exhibit AN, introduced and filed into evidence.

(Testimony of John L. Church.)

(Whereupon Account Receivable referred to was received in evidence and marked Defendant's Exhibit AN.)

Q. (By Mr. Cullinan): Calling your attention to Exhibit AN, the upper righthand corner, is the date 9/51. Was this opened up at the time of the meeting with Mr. Phillips?

A. No, this was opened up at the time of the first entry which is dated, I think, September——

Q. 28?

A. 28, and is reference to our credit file which was opened up September 1.

Q. Now, the word "limit \$5,000" in the upper righthand corner, when was that figure inserted?

A. That figure was inserted some time in November when this first sale to the commissary went into effect.

Q. Was there any discussion——

A. November, 1951. [447]

Q. Was there any discussion between you and Mr. Phillips with respect to that figure of 5,000?

A. Well, I have no definite recollection of a \$5,000 figure. My recollection of my discussion with Mr. Phillips were along a general line, that I would have——

The Court: That's not an answer to the question.

Q. (By Mr. Cullinan): Was there any discussion about a \$5,000 figure?

A. I have no recollection, with Mr. Phillips.

(Testimony of John L. Church.)

Q. Now, have you prepared from this accounts receivable a summary of the totals of the debts and the credits for the calendar years covered by this accounts receivable? A. I have.

Q. I hand you a document and ask you if that is a summary of the debits and credits on this account taken from the accounts receivable, Exhibit AN, for the calendar years involved in the accounts receivable? A. It is.

Mr. Cullinan: I would like to introduce this in evidence as our next exhibit, as a summary.

The Clerk: Defendant's Exhibit AO introduced and filed into evidence.

(Whereupon summary referred to was received in evidence and marked Defendant's Exhibit AO.)

Q. (By Mr. Cullinan): Now, Mr. Church, this exhibit just [448] introduced has the debits and the credits for the years '51, '52, '53, and '54, '54 being only on the credit side. Then there is a summary at the bottom entitled "Actual Debits and Actual Credits." Now, calling your attention to the debit side in the year 1951, \$22,114.74, that includes, does it not, the computation includes two prebills dated October 16, 1951? A. That is correct.

Q. One in the sum of \$9,490 and one in the sum of \$3,112.50. A. Yes, sir.

Q. Now, what were those prebills?

The Court: What are we going to take up mat-

(Testimony of John L. Church.)

ters of this kind for? Obviously there were some items that were either duplications or some——

The Witness: They were payable——

The Court: ——and they don't represent the actual debit or credit amounts. I don't want to go into all this, gentlemen; it has no bearing on the case of any material nature.

Mr. Cullinan: I wanted to establish how we arrived at the actual debits and credits.

The Court: Apparently there is no dispute as to the amounts. Nobody has made any contention this is not a correct statement of the account.

Q. (By Mr. Cullinan): Mr. Church, I hand you a yellow, a [449] series of yellow pages entitled, "Wellington Phillips Company," and ask you if that is a summary prepared from the records under your control of invoices by date, by number, the amount, and the date that those invoices were paid. A. That is correct.

Q. And that was prepared under your direction?

A. That was prepared under my direction and at my request.

Q. And that is a correct summary?

A. It is a correct summary.

Q. Now, calling your attention——

Mr. Rothert: Just a moment. Let me see it.

The Court: Can't we shorten this matter, gentlemen? This case is now getting to a point where I just don't see any point to it. What interest is it to the Court to have summaries of the information?

Mr. Cullinan: The purpose of this document,

(Testimony of John L. Church.)

which I proposed, about to propose as an exhibit, it shows when invoices were paid, what dates, and it shows at the start he paid right ten days after being invoiced, and then in January of 1953 he started to pay much later than ten days, until we get down towards the termination where he is three and four months behind in his payments. Now, the accounts receivable have—you can't translate the invoice billing and the payments—you can't relate them without a summary that shows that an invoice dated December of 1952 was paid [450] on April of 1953. This summary selects the invoices by date of billing and the payment, shows what date each invoice was paid, and through that we are able to show, then, they started out on a ten-day basis, started to make it fifteen and twenty——

The Court: I don't think there is any dispute about the fact that was the story of the account.

Mr. Rothert: We will agree that is the general trend. I don't think we can agree with the exact accuracy, but I don't think the differences are important.

Mr. Cullinan: The intent of the plaintiff in starting his payments right ten days after billing, and then later gradually—and this shows how the material started to expand, until we get to—at the time of termination and just before, until he was three and four months behind.

The Court: Well, there is no question about that. The evidence already shows that. Of course, coincidentally his business was increasing.

(Testimony of John L. Church.)

Mr. Cullinan: May we introduce this?

The Court: All right.

Mr. Cullinan: Offer this in evidence as our summary.

Mr. Rothert: Are they records from which they were taken here?

Mr. Cullinan: Yes, that's this (indicating).

Mr. Rothert: I mean, that's a summary of a previous [451] exhibit?

Mr. Cullinan: Yes, it ties the dates of——

The Court: Ties the dates of payment and billing in with the invoice record. That's what you're putting in, isn't it, counsel?

Mr. Cullinan: Yes, your Honor.

The Court: All right. Exhibit AP, is it?

The Clerk: Yes, sir. Defendant's Exhibit AP introduced and filed into evidence.

(Whereupon, summary referred to was received in evidence and marked Defendant's Exhibit AP.)

Q. (By Mr. Cullinan): Did you ever have any conversation with Mr. Phillips subsequent to the one, the last conversation that you testified to?

Mr. Rothert: In September, '51?

Mr. Cullinan: September, '51.

Q. Did you ever have any conversation with Mr. Phillips about changing terms of payment?

A. It is possible in that period that I did have some discussions with him. He may have come into the office and made some——

(Testimony of John L. Church.)

The Court: You will have to answer the question, did you or didn't you.

The Witness: To the best of my recollection, I did not, your Honor. [452]

Mr. Cullinan: Your Honor, I know that you want to shorten this up and there are a lot of letters in evidence written by Mr. Church to Mr. Phillips and back and forth, talking about the status of his account. I had proposed to go into some of those letters; I think your Honor feels the letters speak for themselves.

The Court: I am inclined to think so. I read them as they came in and I think I have a pretty good idea of the relationship between the parties. I don't see there is any particular dispute with reference to the status of the account. It is as it was.

I think you can take it that whatever finding the Court would have to make in that regard would be in accordance with the actual record facts as shown in the record and in the letters. If you have some particular thing that you feel you want to present, don't hesitate to do so. Again, I don't want to foreclose you, but I don't see any particular significance in this controversy to that fact. I don't see any necessity for any evidentiary matter being presented concerning it, because it does appear from the record that as time went on the plaintiff, his credit-debit balance was built up and got bigger, although it remained, according to the record here, fairly static over a period of time as to the amounts.

(Testimony of John L. Church.)

I notice it stayed around between 18 and 22 or 23 thousand dollars except for one period [453] when it went up to \$27,000. That went on over a period of time and that the payments of the actual invoices were made sometimes several months after the invoices were rendered, and that that was the condition of the account at the time of the so-called termination.

Now, I don't know what you can add to it by any further testimony in that regard. That's what it is.

Q. (By Mr. Cullinan): Mr. Church, did you at any time ever tell Mr. Phillips that he could pay when able? A. I never did.

The Court: I didn't hear that.

Q. (By Mr. Cullinan): Did you at any time tell Mr. Phillips that he could pay Hunt Foods for merchandise sold to him when able?

A. Never did.

Q. Now, it is admitted that certain trade acceptances were issued and without further, if counsel has no objection—we would like to introduce the originals of the trade acceptances.

Mr. Rothert: No objection.

The Court: All right.

The Clerk: Defendant's Exhibit AQ introduced and filed into evidence.

(Whereupon, trade acceptances were received in evidence and marked Defendant's Exhibit AQ.) [454]

The Court: Three, aren't there?

(Testimony of John L. Church.)

Mr. Cullinan: There are three.

The Clerk: Three, sir.

Q. (By Mr. Cullinan): Now, Mr. Church, prior—just prior to the signing of these trade acceptances did you have a conversation with Mr. Phillips about the execution of the trade acceptances?

A. I did.

Q. Well, how long prior to the signing of this trade acceptance did you have a conversation with Mr. Phillips about a plan to sign the trade acceptances?

A. Well, immediately after the time I received notice of the termination of this arrangement, I started collection procedure.

Q. Let me clarify that. The trade acceptances are dated July 8, 1953? A. That's right.

Q. Was there any discussion just prior to July 8, 1953, when these were signed, with Mr. Phillips?

A. There was.

Q. How long before that?

A. I believe the earliest date I talked to Mr. Phillips was about in May, 1953, about the payment of his account, how he wanted to pay it.

Mr. Cullinan: Could we have a short recess at this time? [455]

(Recess.)

Q. (By Mr. Cullinan): Mr. Church, did you ever have a conversation with Mr. Phillips in which he referred to a contract with Hunt Foods?

A. I did.

(Testimony of John L. Church.)

Q. When was that conversation?

A. That, I believe, was in the first part of 1954, probably February or March. He had come down to my office to discuss further payments on the trade acceptances.

Q. The trade acceptances were then——

A. They had been signed and he had been paying on account.

Q. Yes. What was said by Mr. Phillips and by you at this time?

A. Mr. Phillips was present, Mr. Conrad, my assistant, and myself. Wellington said that he wanted to get out accounts paid up and that when he had gotten it paid up he intended to file a suit for damages against Hunt. I said, "What are you talking about?" "Well," he said, "I have a contract with Hunt and that has been breached and I have a damage action against you. I don't want to let that stand in the way of my payments; I want to get cleaned up first."

My answer to that was, "I don't believe you have any contract. I have lived with this deal from start to finish, and I know of no such arrangement. But if you have such a contract, you send me a copy of it, tell me what you got in [456] mind and I will take it up with my people. By the way, you are not referring to that letter which Glenn sent out announcing your appointment as a jobber?" He said, "No, I am not referring to that letter. I have a letter of agreement appointing me as exclusive distributor with no cancelation privilege."

(Testimony of John L. Church.)

I said, "If you have such a letter, submit it. If you don't, I don't want to hear any more about any negotiation or payment of this matter."

Q. Did you have any prior conversation with Mr. Phillips in which the subject of a contract was mentioned?

A. At no time in my prior discussion with Mr. Phillips was the subject of contract mentioned.

Q. You had many discussions with him between December, 1951, and April of 1953? A. I did.

Q. You had many discussions between April of 1953 and March of 1954? A. Quite a few.

Q. Your discussions, apart from the letters which are in evidence, did you have any telephone conversations with Mr. Phillips relative to this status of his account between April of '53 and this March of '54 date? A. I did.

Q. And in any of those conversations was the subject of a [457] contract at all discussed? This is between April, '53, and March of '54.

A. Not after his attorney wrote that letter making a demand on us.

Q. The conversations, the telephone conversations between April of '53, and March of '54, were relevant to the status of his account?

A. Status of his account, that is correct.

Q. It has been testified that initially you had this 1950 partnership return, initially when you were arranging with Mr. Phillips and were making arrangements already discussed about in September, '51, you had his 1950 income tax return?

(Testimony of John L. Church.)

A. Yes, he gave us that.

Q. After that date did you ask for further financial statements?

A. At regular intervals we were asking him for late financial figures.

Q. And when did you get the next financial statement from Mr. Phillips?

A. Well, the 1951 figures——

Q. To refresh your recollection, so we will get it exact, I show you a document, partnership income return, 1951, Wellington Phillips, with a receipt stamped, received May 15, 1952.

A. That is the date we received it in my department. [458]

Q. And between September of '51 and May of '52 you had not received any other financial statements from Mr. Phillips? A. I did not.

Q. Did you, after May 15, 1952, receive any financial statements from Mr. Phillips?

A. He gave me some figures, I believe, in the first part of '53.

Q. Would that be his '52 income tax return?

A. It was his '52 income tax return.

(Colloquy between counsel inaudible to the reporter.)

Q. (By Mr. Cullinan): I show you the partnership return of income for the year 1952 from Mr. Phillips. Counsel has handed me, pinned together, two documents; one is entitled "Return," and the other is entitled "Amended Return." Showing you

(Testimony of John L. Church.)

the one that is not entitled "Amended Return," I ask you if that is what you received, was a copy of this document.

A. I don't recall whether—what I had was in pencil figures like this.

Q. Look at the total.

A. It showed a net income of \$5,000.

The Court: Do you want to introduce some document in evidence?

Mr. Cullinan: I just want to ask him, without introducing the document, what the total income showed on that [459] partnership return was.

The Court: Well, state what it was.

The Witness: It was \$5,000—

The Court: If there is no objection.

Mr. Rothert: No objection. I think the accountant himself said that an amended return wasn't made until some time—

The Witness: I never received a copy of the amended return—

The Court: Never mind.

Mr. Rothert: So he couldn't have—

The Court: Have you got an amount there, counsel?

Mr. Cullinan: \$5,239.27.

Q. Mr. Church, between that receipt of that income tax return and the receipt in May of 1952 of the '51 income tax return, did you have any financial statements from Mr. Phillips?

A. It seems to me I received a balance sheet,

(Testimony of John L. Church.)

some figures from them; what the date is I don't recall.

Q. You don't recall whether it was between May of '52 and the receipt of this '52 income tax return?

A. No, that was prior to May, '52.

Q. Prior to '52. Now, based upon the information, the financial information with respect to Mr. Phillips, that was in your possession during the time of his purchase and [460] sale of Hunt products, what is the limit of credit that you would allow him?

Mr. Rothert: I will object on the ground it is self-serving, calls for the opinion and conclusion of the witness.

The Court: I will sustain the objection, what he would do. I don't see that that is of any importance. What was done was the only factual matter involved. [461]

Q. (By Mr. Cullinan): Exhibit C, a letter dated April 22, 1952, from Mr. Phillips to you, refers to the formation of a corporation by Mr. Phillips. Prior to that time had you been consulted by Mr. Phillips with respect to any plan to form a corporation?

Mr. Rothert: Objected to as incompetent, irrelevant and immaterial——

The Court: I am inclined to think so. I don't know what that has to do with it.

Mr. Rothert: The partnership did it all the time; they had a corporation, but——

(Testimony of John L. Church.)

The Court: The corporation didn't have any part in this.

Mr. Cullinan: Well, it appears on this, your Honor please——

The Court: Unless you claim that it did, of course, you can bring it out. If it didn't, what is the good of wasting time about it?

Mr. Cullinan: What I wanted to show is this, that under the plaintiff's interpretation of his arrangement he could dissolve his partnership, form a corporation without even talking with Hunt Foods. In other words, he could terminate the arrangement with us any time he felt like it.

The Court: I don't see the materiality of that, what he though he could do. It's something that wasn't done.

Mr. Rothert: We made no such contention, your Honor. [462]

Mr. Cullinan: No further questions.

Cross-Examination

By Mr. Rothert:

Q. Mr. Church, I will show you a Hunt's Food invoice, No. 41430 to Wellington Phillips in the amount of \$140.25.

Mr. Cullinan: What is the number of that invoice?

Mr. Rothert: 41430.

Q. It has a payment stamp—paid stamp on it. Is that a paid stamp used in your office?

(Testimony of John L. Church.)

A. It is not. It is somebody else's paid stamp. We do not stamp invoices and mark them paid and send them back.

Q. That must be Mr. Phillips' paid stamp.

A. Paid stamp, and they paid him.

Q. I see. When the Nut Tree, for instance, paid here——

A. Yes, it is—evidently this invoice was returned by the customer to Mr. Phillips and marked paid for his records, and it does not have any relationship to his payment date and our payment date.

Q. The same thing would be true of these others?

A. Yes, those are similar stamps, you will notice.

Q. Yes. Well, showing you that same invoice, what would be the invoice date on that?

A. You mean the date we transmitted it to Mr. Phillips?

Q. Yes, the date when it became an invoice and started time running for payment? [463]

A. I would say October 21.

Q. 31? A. October 31, 1951.

Q. That is the date you sent them out?

A. Yes, and his ten days would run from that date.

Q. This one says "Net ten days".

A. Yes, there is no cash discount on that invoice.

Q. Nearly all of your invoices to Phillips would show two per cent ten days, wouldn't it?

A. I would assume that would be correct, Mr.

(Testimony of John L. Church.)

Rothert, because he was entitled to a cash discount under this arrangement.

Q. Now, later on——

The Court: I don't quite understand that. I don't know whether it is of any importance in the case or not, but what benefit is it to anybody that buys merchandise if he has to pay it in any event in ten days, why, then, your purchase price—your statement as to a discount is meaningless, isn't it? You might just as well say, instead of billing a man for \$100, you bill him for \$90 payable in ten days.

The Witness: Well, he doesn't have any period after the ten days, your Honor, in which his account is not delinquent. That is the only meaning of it. It is a term generally used only in the canning industry.

The Court: Well, I used to have a little experience in business many years ago, and I am just wondering about it. [464] There is no virtue to that sort of thing, it doesn't have any meaning.

The Witness: The real intention is he has ten days. If he pays it in ten days, all right, but we can go after him on the eleventh day as a delinquent account. He doesn't have 30 days——

The Court: Well, you might as well bill him for \$90 instead of \$100.

The Witness: Well——

The Court: Due and payable in ten days.

The Witness: Well, if he didn't pay it he would still get the lesser amount under the net billing arrangement.

(Testimony of John L. Church.)

Q. (By Mr. Rothert): How long a period of time is there——

The Court: He has to pay it in the ten days to get the discount.

The Witness: That's correct.

The Court: If they don't pay it in ten days, what is the status of the account?

The Witness: It is delinquent.

The Court: You mean you are going to charge him interest?

The Witness: No, we don't charge interest, but we proceed to go after him for collection. But if he had 30 days net, we wouldn't start our collection process until after the expiration of the 30 days, or 60 days, whatever period of time it may be. Some firms sell on a —— [465]

The Court: You say that is something peculiar to the canning industry? It isn't a general procedure in business, is it? I never saw——

The Witness: I have heard of it in other firms, but not on a general basis, your Honor.

The Court: Well, why do you mean to do that?

The Witness: Well, it started with drafts. At one time all your canning business was done on sight draft and they were allowed ten days in which to pay the sight draft and earn their cash discount. Then when they went over to open billing, the same billing terms carried.

The Court: Really the basis upon which it started didn't exist any more. You just followed the old custom.

(Testimony of John L. Church.)

The Witness: Followed the old custom, that is correct.

The Court: I am sorry I interrupted you. Go ahead.

Q. (By Mr. Rothert): For how long a period of time where you bill for two per cent ten days, how long a period of time exists when a buyer may not get the cash discount and is not delinquent in paying the account?

A. I don't understand that question.

Q. Well, at a certain point the cash discount is no longer available and at a certain point it is due and payable and is thereafter delinquent. What's the margin of time between those two points?

A. The 11th day after the date of the invoice the account is [466] delinquent.

Q. And on the 10th day he can get the two per cent discount?

A. If he paid it on the 10th day he would get the cash discount.

Q. Now, as I understand it, you don't recall any discussion with Mr. Phillips that he was to have \$5,000 line of credit?

A. Not that particular, no.

Q. Do you recall any discussion in which any specified amount was stated as a line of credit to Mr. Phillips?

A. Well, when we opened the account——

Q. Well, just say——

A. I do recall a discussion where Mr. Phillips and I generally discussed the amount of credit I

(Testimony of John L. Church.)

would give him. That started back in about August of '51. He said he would need \$5,000 of credit. I told him that based upon the information I had I wouldn't give him that much; I might give him a couple of thousand dollars, that he would have to submit me financial information to justify \$5,000 of credit or any other amount of credit; that in my opinion he didn't have a financial background sufficient to justify this arrangement and that he would have to get the money from some place else, or find some other way of doing business if he ever was going to do the business that he hopefully intended to do.

Q. Now, when you say "this arrangement" what arrangement are you talking about? [467]

A. Taking the account as a jobber to sell our products to commissaries. He talked about, well, "You are doing, say, \$1,000 a month. I hope to get that up to \$5,000 in no time, maybe \$10,000." I say, "When you get \$10,000 a month you are out of business; you are out of business above \$5,000 a month unless you can find some way to pay me on the due date or on a cash basis."

He said, "I can't pay you on a cash basis."

Q. Well, later on, about the time of the assignment of the accounts receivable you did approve an extension of credit to the point where Mr. Phillips could pay you after he got the money from the Government on those commissary sales?

A. After the assignment of the accounts receiv-

(Testimony of John L. Church.)

able he was to pay us the day he got the money from the Government.

Q. And you were informed at that time that in some cases the Government was as late as 60 days in paying, were you not?

A. That isn't the way I was informed.

Mr. Cullinan: Just a moment.

Q. (By Mr. Rothert): Well, did Mr. Phillips make such a statement to you?

A. He didn't make it exactly that way. His statement was: "You know, there is billing errors, short payments and so forth and not always be paid promptly."

I said, I understood those matters and would take such information into account where occasionally he would go beyond [468] a normal period of payment.

Q. Did Mr. Phillips ever discuss with you that some sales had been turned over to him by the Hunt salesman without profit?

A. No, he never did.

Q. You didn't write him any letters about his accounts, did you, after June of 1952? There is a letter of June—I am looking at the wrong date.

The Court: June 30—no, that is '53. You wrote him letters in '53. [469]

Q. (By Mr. Rothert): During the period from June of 1952, to May of 1953, you didn't write Mr. Phillips any letters about his account, did you?

A. I have no recollection of any such letters. If I did, they would be in the file.

(Testimony of John L. Church.)

Q. At any time did Mr. Phillips tell you that the Government sometimes was as slow as 30 or 60 days in paying for the sales to the commissary stores?

A. As I stated before, he said there would be occasions when they would be slow. That is the general rule.

Q. Did you tell him anything to the effect that in those cases he would nevertheless have to pay in 10 days whether he got the money from the Government or not?

A. Up to the assignment of the accounts receivable our terms were 10 days and only 10 days. He never had any provision or arrangement to pay beyond the 10-day period. It was a very specialized controlled account and it was handled as such.

Q. It changed at that point, didn't it?

A. It changed at that point.

Q. Other than the 2 per cent 10 days entries on the invoices and what you told Mr. Phillips about it—I will withdraw that.

Did you have any information during the time that Mr. Phillips was selling these accounts that his volume of business [470] was increasing?

A. No, other than what would show on the ledger account.

Q. The dollar amounts on the ledger card?

A. That's right.

Mr. Rothert: I have no further questions.

(Testimony of John L. Church.)

Redirect Examination

By Mr. Rothert:

Q. Mr. Church, I show you a letter dated June 30, 1953, relating to the account, the assignment of accounts receivable. You sent that letter to Mr. Phillips? A. I did.

Q. In that letter you state——

Mr. Rothert: Your Honor, this letter is after the date of termination.

The Court: It is already in evidence, isn't it? It is Defendant's Exhibit L.

Mr. Cullinan: June 30th of '53?

The Court: Yes, from Church to Phillips.

Mr. Rothert: Yes.

Mr. Cullinan: Yes, from Church to Phillips.

The Court: You have got it marked as Defendant's Exhibit L.

Mr. Cullinan: Yes, your Honor. I thought that was another one.

Q. I call your attention to Defendant's Exhibit L in which it is stated in the first paragraph: [471]

“With reference to your account with us and the discussions which you have had with our Mr. Lentz, to say the least I am very disappointed in our collection results. There is owing to us at the present time \$23,198.90, and to the best of our knowledge only a few thousand dol-

(Testimony of John L. Church.)

lars remains to be collected by you from the Government agencies to whom this merchandise was sold, which means you have collected over \$20,000 of money belong to Hunt Foods, Inc., and have failed to account for it. All sales made to you under assignment of accounts receivable which made you trustee for all monies for our account. You have had no authority to use any of this money for your own uses.”

Now did you at any time prior to the termination have any conversation with Mr. Phillips with regard to the status of the payments under those accounts which had been assigned? That is, prior to April of '53. Did you have any telephone conversations with him?

A. I'm sure I had a few telephone conversations but I can't place the exact dates.

Q. Did you have any telephone conversations prior to—do you know whether any were prior to the termination of Mr. Phillips? [472]

A. No; immediately prior to the termination date my collection contact was through the Hayward office, and Mr. Steiger.

Q. Mr. Steiger? A. Yes.

Q. Anybody else at that office?

A. No; I would send it either to Flynn or Steiger as the case may be. They were both equal in the collection end of it.

Q. Did you have any meetings with Mr. Phil-

(Testimony of John L. Church.)

lips in the latter part of '52 or early '53 regarding the status of his account?

A. None that stands out, no; he may have come into the office.

Q. He may have, but you don't recall?

A. No.

Q. Now, I hand you a letter dated May 8, 1952, from you to Mr. Phillips relating to the accounts receivable and ask you if that is a letter you sent to Mr. Phillips? A. I did.

Q. I call your attention to the middle of the next to the last paragraph:

“I would appreciate it very much if you would continue to pay as many of these Government accounts within our terms as is possible. We will expect payment of those accounts that require a longer time to pay immediately after you receive payment.” [473]

Was there any discussion with Mr. Phillips at this time about the terms of payment on his account to you—to Hunt?

A. There was. He said that he would need longer terms in some instances, but that for the most part he would continue to pay within 10 days.

Q. And what did you say?

A. I said that's the way I wanted it. That letter confirms what we discussed.

Mr. Cullinan: I will offer this letter of May 8, 1952, as our next in order.

(Whereupon, letter of 5/8/52 was received in evidence and marked Defendant's Exhibit AR.)

Mr. Cullinan: That is all.

Mr. Rothert: No questions.

The Court: That is all.

Mr. Cullinan: Call Mr. Steiger.

EDWARD STEIGER

recalled as a witness on behalf of the defendant;
previously sworn.

Direct Examination

By Mr. Cullinan:

Q. Mr. Steiger, what products represent the bulk of Hunt Foods canned business?

A. Tomato sauce, tomato ketchup, peaches, tomato juice, solid pack tomatoes. [474]

Q. Those particular items represent the great proportion of Hunt Food's products?

A. A substantial portion of our volume.

Q. Now, Mr. Steiger, in your capacity as a representative of Hunt's in the Hayward office, have you had occasion at regular intervals to go around to the chain stores to observe prices of Hunt's articles and other articles on the shelves?

A. Yes.

Q. Have you at any time noted the price of, let us say tomato sauce, on the shelf of a chain store?

A. Yes.

Q. Have you had any occasion—let us take S&W

(Testimony of Edward Steiger.)

tomato sauce—to note the price of S&W tomato sauce? A. Yes.

Mr. Cullinan: Strike that.

Q. You have had occasion to note the price on the shelf of a chain of Hunt Foods tomato sauce, have you not? A. Yes.

Q. At that time would you know the cost to the chain of Hunt Foods tomato sauce?

A. At what time, sir?

Q. At the time you saw the item. In other words, let me ask you this preliminarily: You are current at all times on what Hunt's was selling its products for—at what price it was selling its products to the chains, are you not? [475]

A. That is part of my job.

Q. When you observe a price of Hunt's tomato sauce at a chain, can you tell the markup on that tomato sauce when you see the price on the shelf of a chain store? A. Pretty close.

The Court: What are you trying to find out? Whether the witness knows what the stores sell the products of Hunt's for?

Mr. Cullinan: What the markup is.

The Court: What they sell it for would accomplish that. Obviously he should know that. I don't think you need to spend a lot of time laying a foundation. Ask him what you want to know.

Q. What generally is the markup, from your observation, on Hunt's tomato sauce?

A. In chain stores?

Q. In chain stores.

(Testimony of Edward Steiger.)

A. I would say the average is three cans for 21 cents.

Q. I meant the percentage markup.

A. Oh, the percentage markup. Eight to ten per cent regular weekdays; as low as cost or two per cent on weekends.

Q. What about tomato ketchup?

A. Ketchup would be a little bit higher. I would say ketchup would average around 14 to—maybe average 14 per cent weekdays; sometimes cost on weekends or 10 per cent. [476]

Q. And what about, say, tomato juice?

A. Tomato juice being a more competitive item would probably be not higher than $16\frac{2}{3}$ per cent; perhaps an average 10 per cent markup, and at cost or below cost on a weekend if there were a special in that store.

Q. Mr. Steiger, during the time that your salesmen were selling to the commissaries you had occasion to visit the commissaries and go with salesmen at times to the commissaries, did you not?

A. I went to Castle Air Force Base once and a couple of times to Presidio, San Francisco. I didn't make a general practice of it, but I did visit a base or two.

Q. And the officers in charge of the various commissaries changed from time to time, did they not?

A. Yes, yes.

Q. And at times when there is a change in commissary officers is there a change in the line of products that is put into the commissaries?

Mr. Rothert: I will object on the ground that

(Testimony of Edward Steiger.)

it calls for the conclusion and opinion of the witness.

Mr. Cullinan: From his experience.

The Court: That is a pretty general question.

Mr. Rothert: He only went to two of them.

The Court: I would be here for a week going into every item and every different man. I will sustain the objection. [477]

Q. (By Mr. Cullinan): Mr. Steiger, you testified—this, if your Honor please, is just to get the record straight—you testified that after the accounts receivable were assigned you had never gone to Mr. Phillips to discuss the status of his account with him. Subsequent to that testimony we have discussed the accounts receivable and trade acceptances, and I ask you whether that testimony that you never went to Mr. Phillips' office to discuss his accounts after the execution of the assignment of the accounts receivable was correct?

A. No, it was not correct, because I did visit Mr. Wellington Phillips' office after the assignment of the account.

Q. And for what purpose?

A. For collection.

Q. And without going into it at this time so that we won't delay things, how many times you visit him after the assignment of the accounts receivable?

A. At least once.

Q. And on that occasion was the conversation as you have related yesterday on the stand with respect to his account, the status of his account?

A. Similar, yes.

(Testimony of Edward Steiger.)

Q. Do you know, Mr. Steiger, what proportion of Hunt's products are represented by the items that you mentioned? You said they were a substantial part. Do you know the percentage of Hunt volume that is attributable to these items? [478]

A. At least 80 per cent.

Q. At least 80 per cent?

A. At least 80 per cent.

Mr. Cullinan: That is all.

Cross-Examination

By Mr. Rothert:

Q. Is that 80 per cent on nationwide over-all sales or Northern California?

A. I can speak only from our district in Northern California.

Q. On the other items of the Hunt line not mentioned specifically by you, did you find that the percentage of markup in chain stores was usually more than the items specified?

A. Slightly above, yes.

Q. This one time you saw Mr. Phillips after the assignment of the accounts receivable, was that in 1952 within a month or two or three after the assignment?

A. It could have been, say, three months after the assignment.

Q. Did you have anything to do with turning over to Mr. Phillips sales that salesmen had made at San Luis Obispo commissary and Hamilton Air Force Base commissary for him to handle?

(Testimony of Edward Steiger.)

The Court: This is another subject now which wasn't gone into on direct examination, and if it is a subject will you tell me what the materiality is? [479]

Mr. Rothert: The materiality is that they were turning over to Mr. Phillips accounts on which the prices had been fixed with no profit for him to assume the credit of financing those orders at the very same time he was talking to them about "Hurry up and pay your account," or during that general period.

The Court: What do you mean by taking over the orders?

Mr. Rothert: Well, the salesmen got an order from the Government and priced the order. Before it was filled it was turned over to Mr. Phillips and Hunt's billed Mr. Phillips.

The Court: And he filled it and was billed for the amount?

Mr. Rothert: And he filled it and was billed at two per cent 10 days.

The Court: Is that correct or not?

A. That is correct in, at least, one instance.

Q. (By Mr. Rothert): Wasn't it correct in one instance that Hamilton and one instance at San Luis Obispo? A. You are right, sir.

Q. And that was at least not before the latter part of 1952?

Mr. Cullinan: Can we have the date set?

Mr. Rothert: San Luis Obispo in October and Hamilton Air Force Base in December of '52. [480]

The Witness: What is the question, sir?

(Testimony of Edward Steiger.)

The Court: Is that correct or not? Can't we get along?

The Witness: It is correct.

The Court: It is awfully slow.

Mr. Rothert: I have no other questions now.

Redirect Examination

By Mr. Cullinan:

Q. Mr. Steiger, the price in chain stores on the shelves, were they higher than those at commissaries, at nearby commissaries?

A. Considerably.

Q. Higher priced? A. Considerably.

Q. The chain store prices were higher than the commissary?

A. Considerably higher than the commissary.

Mr. Cullinan: That's all.

Recross-Examination

By Mr. Rothert:

Q. You mean considerably more than the percentages that you have testified to which was the difference between the Hunt prices and the prices on a chain store shelf?

The Court: No, no, that isn't what he means. He means the prices that were charged in the chain stores were higher than the prices charged in the commissaries.

Q. (By Mr. Rothert): Considerably more. Was that difference greater than the percentage of

(Testimony of Edward Steiger.)

markup that you observed in [481] the chain stores?

A. Do you mean does the commissary take a greater markup than the chain store?

Q. No. Did you sell to the commissaries and to the chain stores at substantially the same price?

A. Yes.

Q. Now, you say that the chain stores had a markup of certain percentages on certain items, you have already testified to that. Now, how much lower were the commissary prices on the shelf than the chain store prices on the shelf?

Mr. Cullinan: What particular item are you talking about?

Mr. Rothert: These same items that he said there was considerably more difference between the prices.

A. I would say about nine per cent, perhaps.

Q. Nine per cent represents the difference between what?

A. Between the eventual—the markup in the commissary as against the markup in the chain.

Q. Do you mean the price in the commissary or the markup in the commissary?

A. The markup as well as the price.

Q. Well——

The Court: What difference does it make? They were sold at the same price to the commissaries as they were to the chain stores. [482]

Mr. Rothert: Well, it only makes a difference—he said the difference in price at the commissary stores and the chain stores was considerably more.

(Testimony of Edward Steiger.)

Now, if they sold them at the same price to both, how could the difference in price be considerably more than the markup in the chain stores? It couldn't be.

Mr. Cullinan: That isn't what he testified to.

The Court: I don't understand that.

Q. (By Mr. Rothert): You said considerably more; what would you——

The Court: Obviously the commissary stores sold these same commodities cheaper than——

Mr. Rothert: Yes.

The Court: Well, everybody knows that.

Mr. Rothert: I know that.

The Court: What is the point you want to make?

Mr. Rothert: I want to find out what he was talking about when he said that this difference was considerably more.

The Court: I didn't understand the witness to say that.

The Witness: I said considerably more, your Honor.

The Court: You mean the commissaries charge more for the same merchandise than the chain stores?

The Witness: No, sir, the question was——

Mr. Rothert: The difference between the commissary prices and the chain store prices. He said they were considerably [483] more.

The Witness: I said the chain store prices were considerably more.

(Testimony of Edward Steiger.)

Mr. Rothert: Oh, I see.

The Witness: Than the commissary.

The Court: Well, anything else now?

Mr. Rothert: No further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Now, you have got still something to present, I take it, to wind up the case on either side?

Mr. Cullinan: Just a moment, your Honor.

The Court: I think we had better put it over anyhow; you may want to make some argument, or something like that, finish up whatever evidence either side has.

Two o'clock. Would that be all right?

Mr. Cullinan: Yes.

(Whereupon, an adjournment was taken until 2:00 p.m., this date.) [484]

Friday, December 2, 1955—2:00 P.M.

The Court: Have you any further witnesses?

Mr. Cullinan: No, your Honor.

When Mr. Cousins was on the stand I sought to bring out that there is in the industry a custom and usage in appointing jobbers under which the arrangement is terminable at the will of each. I did not make a formal offer of proof at that time although the colloquy indicates that that is what I

wanted to do. And if it is satisfactory with the Court to consider that colloquy at the time as a formal offer of proof I would not make one now. Otherwise, I would make a formal offer of proof.

The Court: That is all right with me if it is with counsel.

Mr. Cullinan: Thank you.

Mr. Rothert: It is all right that we consider that as an already made offer of proof?

Mr. Cullinan: Yes.

Mr. Rothert: That is all right with me, yes.

Mr. Cullinan: We have no further witnesses.

Mr. Rothert: I will call Mr. Phillips.

L. W. PHILLIPS

recalled on behalf of the plaintiffs, in rebuttal; previously [485] sworn.

Direct Examination

By Mr. Rothert:

Q. Mr. Phillips, I will show you what purports to be an invoice from Hunt Foods, No. 40068, dated October 18, 1951. Is that an invoice that you received from Hunt Foods on or about that date for purchases from Hunt Foods? A. That is.

Q. In the amount of what? A. \$910.

Q. I hand you a check of Wellington Phillips Company, No. 2224, dated—it looks like 11/2/51.

A. That's right.

Q. And ask you what that is?

A. This check is in payment for this invoice.

(Testimony of L. W. Phillips.)

Q. For invoice 40068? A. Yes, sir.

Q. On the back of it it has the endorsement of Hunt Foods, Inc., dated November 8th, 1951?

A. Yes, sir.

Q. And invoice No. 41430 of Hunt Foods, Inc., in the sum of \$140.25, dated October 31, 1951.

A. Yes, sir.

Q. Check of Wellington Phillips Company, No. 2260, dated November 21, 1951, in the amount of \$140.25. Is that check [486] in payment of invoice No. 41430? A. Yes, sir.

Q. That has endorsements dated November 24, 1951, of Hunt's Food, Inc.

Mr. Rothert: I would like to offer those in evidence, your Honor. The only purpose is to show that the dates of payment were later than the dates shown on this summary schedule introduced this morning by the defendant and to show that in some of the very early payments by Mr. Phillips the payments were made substantially longer than ten days after invoice rendered.

The Court: You mean in that respect you correct the dates specified in the schedule?

Mr. Rothert: Yes.

The Court: As one exhibit?

Mr. Rothert: One exhibit.

(Whereupon, documents referred to above were marked Plaintiff's Exhibit No. 11 in evidence.)

Q. (By Mr. Rothert): I will show you Plain-

(Testimony of L. W. Phillips.)

tiff's Exhibit 10 for identification, copy of a letter dated July 28, 1952, addressed to Hunt Foods, Inc., attention of Mr. Miller, Sales Manager, and ask you what that is?

A. That is a letter written to Hunt's Foods in Los Angeles, attention Mr. Miller, relative to a conversation.

Q. Is it a letter—— [487]

A. Yes, sir.

Q. ——that you had something to do with?

A. I wrote it; my secretary typed it.

Q. Was it mailed on or about that date?

A. Yes, sir.

Mr. Rothert: I would like to offer that as Plaintiff's next in order.

The Court: What is the date?

Mr. Rothert: July 28, 1952. The contents in it are not—it isn't of any importance here; I just wanted to show another letter sent to Mr. Miller of which he has no recollection or copy.

(Whereupon, document formerly marked for identification was received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. (By Mr. Rothert): Mr. Phillips, in any of the discussions you had with a representative of Hunt's Foods about your account, did anybody make a statement to you in substance that if you——

Mr. Cullinan: Just a minute. I suggest that the witness be asked to tell any conversation without

(Testimony of L. W. Phillips.)

being suggested the substance of some conversation. I think the witness' own words as to what the conversation was would be the best way——

The Court: It looks like you are starting out by leading [488] him on something, unless what you are asking him to do is to controvert something that some other witness testified to. You can then refer to a particular matter. I don't know what you have in mind.

Mr. Rothert: Otherwise, I would have to ask him to repeat every conversation he had, and then in the absence of something it would appear that nothing was said.

The Court: It would not be leading, I don't believe, if the question were put in the form: at any time did you ever make such-and-such a statement? Is that what you have in mind?

Mr. Rothert: Yes, it is, your Honor.

The Court: Suppose you reframe the question.

Q. (By Mr. Rothert): In any conversation you had with a representative of Hunt Foods did any representative or didn't any representative ever make a statement to you that if you didn't pay your account faster than you were then paying it, you might not be allowed to purchase any more of Hunt's Foods products?

A. The statement is that I might not be able to purchase any more? That was never made to me.

Q. In any such conversation did a Hunt's representative make a statement that you would not be able to purchase Hunt foods any more if you

(Testimony of L. W. Phillips.)

didn't pay up your account more promptly? [489]

A. No.

Q. In the times that you talked to Mr. Church about your account did you or did you not at any time state to him that you would continue to pay up most of the invoices within the ten day period?

A. That I would continue to pay up most?

Q. Yes. A. No.

Q. Did you ever talk to Mr. Flynn or Mr. Flynn's office in Hayward? A. Yes, sir.

Q. You talked to him in his office about how many times, approximately?

A. In the course of our arrangements?

Q. Well, let's say just in the fall of 1951.

A. Possibly a half dozen.

Q. Now did you got out during the noon recess to examine any prices at the Safeway Store on Market Street here?

A. I did, sir—the largest Safeway Store there is.

Q. You mean there is in San Francisco?

A. There is, period. That is their largest store.

Q. What prices did you look at—the prices for what items?

A. Tomato sauce and 2½ Hunt's solid pack tomatoes—Hunt's tomato sauce 8-ounce.

Q. What was the shelf prices of those two items? [490]

A. The shelf price at the present moment on Hunt's tomato sauce in the Safeway Stores at Duboce and Market is three for 22, 88 cents a dozen, \$5.28 a case. Their cost is \$4.50. The gross on

(Testimony of L. W. Phillips.)

the selling price is 15 per cent, a gross on the cost of 19. On Hunt's solid pack tomatoes——

Q. What was the price on the Hunt's solid pack tomatoes?

A. The Hunt's solid pack tomatoes were 25 cents, \$6.00 a case, 24 cans in a case. Their cost today is \$4.60, a gross on the case of \$1.40, a gross on the selling price of 23½ per cent, a gross on the cost of 29 per cent.

Q. In your analysis of sales to the Alameda Naval Air Station which you testified about the other day, the average number of cases per item sold in a 12-month period, what percentage of the total sales during that 12-months period is represented by tomato juice, peaches, tomatoes and tomato sauce? A. Thirty per cent.

Mr. Cullinan: You are asking for the percentage of sales at the Alameda Air Station that he made in that one year?

Mr. Rothert: Yes, based on the average monthly volume that he testified to previous.

Mr. Cullinan: What I want to find out, are you talking about specific amounts or estimated amounts?

Mr. Rothert: You will remember he took the entire sales for 12 months of each item and divided it by 12 to get the [491] average number of cases of every item per month, and I would submit that since each item is divided by the same number, 12, that the total sales in the year would end up with the same percentage.

(Testimony of L. W. Phillips.)

Q. That is 30 per cent of what?

A. Thirty per cent of—the figure is figured this way——

Q. You say that represents 30 per cent of what?

A. Of the total volume.

Q. Of the total volume——

A. Each month.

The Court: The total volume of what you sold to them?

A. Yes, sir, of the 54 items, yes, sir.

Q. (By Mr. Rothert): Now during the time from, say, the beginning of 1952 until the time of termination, did you have funds in your business available to pay the Hunt's invoices substantially faster than you did? A. No, sir.

Q. There has been testimony about a sale at San Luis Obispo and one at Hamilton Air Force Base that was turned over to you. In those particular sales did you make the sale yourself?

A. No, sir.

Q. Did you have anything to do with the pricing of the items? A. No, sir.

Mr. Cullinan: If your Honor please, I don't think this [492] is proper rebuttal. The witnesses for the defendant have not gone into what was sold at Camp San Luis Obispo or who arranged for the sale.

The Court: But I thought that Mr.——

The Witness: Steiger.

The Court: One of the last witnesses did testify there were two transactions.

(Testimony of L. W. Phillips.)

Mr. Rothert: Yes.

The Court: I think it was Mr. Steiger; two places that were taken over, as it were, from——

Mr. Cullinan: That testimony was put in as part of the plaintiff's case when he called Mr. Steiger.

Mr. Rothert: Well, that happened this morning.

The Court: It is already in and it hasn't been disputed, so what is it you want to establish?

Mr. Rothert: I want to bring out that some of the items on each of those sales Mr. Phillips had to sell to the commissaries at a price less than he had to pay Hunt Food for it so that it made him lose money on certain items in those sales.

The Court: Well, what were the circumstances under which he took over these particular sales? Why was that done? What is the significance of the details of them?

Mr. Rothert: As I understand it, Hunt Foods continued to sell to Hamilton Air Force Base and that Mr. Phillips [493] consented to that, and then Hunt Foods eventually asked him if he would take it over; on that Mr. Steiger testified when they sort of paved the way.

The Court: Yes, I understand that, but I mean what is the importance of going into the detail of it? This is not an accounting proceeding.

Mr. Rothert: It means that at the time—this happened to be in the fall of 1952, one in October and one in December—that the defendant claims Mr. Phillips was getting pretty bad on his credit.

(Testimony of L. W. Phillips.)

They turned over transactions to him that not only make him lose a little money but that he has to finance himself for Hunt's, in effect.

Mr. Cullinan: There is no claim by the defendant that he had to take that over.

Mr. Rothert: So there would be a small contribution to the state of the account.

The Court: How did it come about? Do these transactions amount to much?

Mr. Rothert: Do they amount to much? One is \$2,000 and the other is——

The Court: It hasn't been developed how that came about. Counsel have made some statements about it but I don't know what evidence there is as to the circumstances under which the plaintiff assumed these accounts, if it has materiality.

Q. (By Mr. Rothert): What happened, what were the [494] circumstances when you took over this sale to the Hamilton Air Force Base?

Mr. Cullinan: If you Honor please, I submit that this is not proper rebuttal.

The Court: Well, I agree with you that it is not proper rebuttal. It is not something that you produced. It is not rebuttal to rebut something that counsel himself develops affirmatively on cross-examination.

Mr. Cullinan: There was no contention in the evidence thus far one way or another as to why it was taken over. No evidence was introduced one way or the other as to why it was taken over.

(Testimony of L. W. Phillips.)

The Court: There has been reference to it and I think that—oh, I will ask the questions myself.

The Witness: O.K.

The Court: Counsel won't be responsible for it and then you can take objection to it if you wish.

The Witness: Yes, sir.

The Court: I want to get through with the testimony.

Q. How did you come to take over these two accounts? A. Hunt's asked me to.

Q. Well, Hunt asked you to. Who asked you to?

A. Mr. Steiger.

Q. Why?

A. Because he wanted his salesmen to call on somebody else [495] and us to service the account as we did the rest of the accounts.

Q. Those were the only sales that had then been made by Hunt's own salesmen at that time?

A. Yes, sir.

Q. And if you took that over that cleared the deck, as it were?

A. Except one account, and that was given to me on the last trip there, the Mare Island Naval Shipyard.

Q. That is the other one that is referred to?

A. The third one.

Q. The third one? A. Yes, sir.

Q. And what were the amounts of these three transactions?

Mr. Rothert: Well, I don't know Mare Island.

(Testimony of L. W. Phillips.)

I don't have that segregated out, but three thousand——

The Court: Are they substantial or are they de minimus?

The Witness: \$3,000.

Mr. Rothert: We are not contending that he lost a lot of money on them but that he handled these accounts without making any profits.

The Court: You have made the contention that they were either the same price that he was being charged for them or less in some instances. You said that. Is that the fact?

Mr. Rothert: I said a number of the items were less than [496] what he was being charged for them.

The Court: What does that amount to?

A. Very small.

Mr. Rothert: Very small?

The Witness: Very small, infinitesimal, 10 or 15 cents a case or 5 cents a case.

Mr. Rothert: De minimus.

The Court: It doesn't amount to much?

A. No, sir.

Q. (By Mr. Rothert): When were you asked to take over the Mare Island account?

A. At the time of Mr. Steiger and my call there in the early part of April or around the 1st of March.

The Court: What year?

A. 1953.

Q. (By Mr. Rothert): Did you have any contact with Mr. Miller in the summer of 1952?

(Testimony of L. W. Phillips.)

A. Did I have contact with Mr. Miller in the summer of '52?

Q. Yes. A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.

Q. What was the subject of your discussions—your sales to the commissaries?

A. Yes, sir. [497]

Q. Or something else?

A. Sales to the commissaries.

Q. Sales to which commissaries?

A. Northern California. Did you say the summer of '52? Is your question the summer of '52?

Q. Yes, it was.

A. Well, that was wrong. I thought you meant '51. '52 I talked to him about——

Q. I show you this letter which is Plaintiff's Exhibit 10. At about that time in July, 1952, did you ever talk to Mr. Miller as distinguished from writing him that letter? A. Yes, sir.

Q. About what?

A. About the sales to overseas bases after Mr. Reid had left.

Q. Who initiated the subject of the sales to overseas bases?

The Court: This is a collateral matter, isn't it, counsel? Why bother with it?

Mr. Rothert: I have no further questions, your Honor.

(Testimony of L. W. Phillips.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Phillips, when you were asked to take over the Hamilton sales, the sales to the Hamilton commissary—— A. Yes.

Q. ——did you object to that?

A. No. [498]

Q. You were glad to get it, weren't you?

A. Sure; it is another account.

Q. Do you know of your own knowledge when Mr. Reid left Hunt's?

A. I do not, sir.

Mr. Cullinan: No further questions.

Mr. Rothert: No questions.

The Court: Now, gentlemen, does that conclude the evidence on both sides? [499]

Mr. Rothert: Your Honor, I have another witness here that is entirely corroborative, and if I may state what it is, it wouldn't be necessary to put him on. Mr. Clark Turner, a food broker, independently of Mr. Phillips, checked the prices of those same prices that he just testified about today during the noon recess and so it would be entirely corroborative of the prices that Mr. Phillips told us about.

The Court: There is no dispute about it. I take it that that's correct.

Mr. Rothert: The plaintiffs rest.

The Court: You want to present this motion now, counsel?

Mr. Cullinan: Be glad to present it now, or in writing, whatever your Honor wishes.

The Court: Well, I would rather have you do it now; since it is practically a factual case, I would like to hear from you, having the facts clearly in mind.

Mr. Cullinan: Your Honor please, under all the evidence in this case there is no contract such as contended for by the plaintiffs. I think it is quite evident from all the evidence in this case that there was no contract for any ten-year term. The plaintiff testifies that he made such an arrangement with a dead man. The witnesses who were present, he says that Mr. Steiger was not present at all of the times. Mr. Steiger never heard ten years mentioned. [500] Mr. Mears, his own witness, and subsequently an employee of the plaintiff, testified that there was no mention of a ten-year period at that conversation. So I think under all the evidence there was no such contract as contended for by plaintiff.

I think the evidence shows that the arrangement with this plaintiff was that we would sell goods to him and he would resell to the commissaries and we would not have our salesmen selling to the commissaries.

Now, that's the whole arrangement between the parties. The first time, the evidence has shown, the first time that this plaintiff ever claimed to have a contract such as he is claiming here now, was

after Mr. Flynn's death, and then only after he was being hard pressed for the payment of these accounts. And the evidence shows that the arrangement between the parties—under the arrangement between the parties, this man was to pay for the goods within ten days, and that he didn't pay for the goods, and at the time of the termination and for some months prior to that, his indebtedness had been building up until finally there was nothing to say we can't deal with a man who can't pay us for the goods; we will get somebody else than can.

I think on the question of the contract it is clear that there is no such contract as is claimed by the plaintiff in this action. [501]

Now, there is no showing, too, that Mr. Flynn had any authority to enter into any such contract as is contended for by the plaintiff in this action. He had no authority from any officer, and Mr. Phillips never dealt with any officer of the Hunt Company.

The evidence also shows that under the arrangement between the parties, Mr. Phillips had no specific obligations. He wasn't required to purchase anything from the defendants. If he sat back and didn't order one case from the defendant, there wasn't a thing the defendant could do about it.

He testified that he had no minimum requirements; he testified that he was free, if he wanted to, to continue his bidding business. He testified that he cut down his bidding business; he was not required to cut down his bidding business. If he didn't cut down his bidding business, there was nothing that Hunt Foods could do about that. And so on

the question of mutuality, which is an important one here, all the plaintiff had to do, the defendant had to sell to the plaintiff if the plaintiff ordered something. But there was no duty on the plaintiff to order as much as one case from this defendant.

The statute of frauds, of course, we have raised here. The plaintiff—even just taking the plaintiff's testimony alone—has not established any grounds for an estoppel to plead the statute of frauds. To raise an estoppel, he has [502] to show that he suffered some unconscionable harm. Now, what he claims is he didn't make much profit in his year of operation. But that is not an unconscionable harm under the decisions.

He did not abandon his business; he was not required to abandon his business. He said he cut down some of his other, his bidding business. But cutting down under the cases, which we have cited in the memorandum on file, on the occasion of our motion to dismiss, the giving up of prior employment or a prior business or operating at a less-than-profit under the decisions is not an unconscionable hardship and does not entitle the plaintiff to assert an estoppel as against the statute of frauds.

Now, of course, the estoppel to plead the statute of frauds applies really to the level where Flynn is dealing with the plaintiff. Now, even if there were enough to establish an estoppel—let's say Flynn was an officer of the corporation and that the plaintiff had actually suffered some unconscionable harm, the question of estoppel then would be the only question. But now, Flynn, not being an

officer of the company, had to have an authority in writing to enter into the contract that the plaintiff claims was entered into, and in the absence of that authority, any representation made by Mr. Flynn to the plaintiff could not bind the corporation, because Mr. Flynn was not authorized [503] to make that kind of a contract and the representation of the agent, assuming that there were such, would not be enough to bind the company.

The Court: That point, of course, would only be applicable if the case stands or falls upon the claim that the contract was in terms to be performed more than a year after.

Mr. Cullinan: Yes.

The Court: Distinguished from a contract that might extend to that period, but was not by its terms to be performed for a period more than a year.

Mr. Cullinan: It would extend, too, your Honor, to a contract if it were held that what they were negotiating for or agreed to was a contract for a reasonable period of time. If that reasonable period of time was more than one year, then it would be a contract for more than one year and would come within the statute. If the reasonable time is less than a year——

The Court: I don't know what the California authorities are on that. I read your memorandum in connection with the motion; I don't think that that point was covered. I am not familiar with what the California authorities held, if there are any, on that subject.

Mr. Cullinan: Well, it is how long is the contract to continue; if it is to continue—— [504]

The Court: In other words, a determination of what is a reasonable time might not be a determination that could be made at the time the contract starts, because if you determine what is a reasonable time from all the facts and circumstances, you may have to take into account facts and circumstances that were not in existence at the time that the contract was entered into.

Mr. Cullinan: Of course, the question——

The Court: It depends on the nature, of course, of the contract.

Mr. Cullinan: The question is what did the parties agree to. If they agreed at the time to a contract for a reasonable period of time and if the reasonable period of time is more than one year, then they agreed to a contract that cannot be performed in one year.

The Court: Well, of course, there is one aspect of the case which would indicate that the arrangement was entered into with no time specified.

Mr. Cullinan: Yes, with no time specified, in which case it would be terminable at will.

The Court: Not necessarily. It depends on the nature of the contract and what it is that the parties were agreeing to do. It might be a contract that was intended to exist for a reasonable time under all of the circumstances of the relationship that is created by the parties at the [505] time.

Mr. Cullinan: *DuPont v. Clearborn*, an Eighth Circuit case, 64 Fed. 2d 255, pointed out that jobber

or dealer arrangements wherein no time is specified are arrangements that are terminable at will.

The Court: I think the rule, whatever it is in that case, has to be determined on the basis of what the case was before the Court. I don't think any court could lay down a rule in every case that would be true.

Mr. Cullinan: But certainly, taking all the evidence in this case, there is no evidence that the parties, first, none that they agreed for any ten years or any said number of years. Secondly, there is no evidence to show that they agreed this would continue for a reasonable period of time. All the evidence shows is that Phillips wanted to be a jobber to sell to the commissaries. Hunt's said, "O.K.; you can sell to the commissaries. We will sell to you and you can resell to them."

The Court: I think you have to assume, I think you have to start out with the assumption it was a contract which was mutually advantageous. I don't put too much faith in the idea that this was some suppliant that came to get a handout and was just a good-natured act on the part of the Hunt people to enter into this arrangement. It was an arrangement that had mutual advantages to them, each having [506] some benefits and some burdens in connection with it, whatever the relationship was. I think that is only fair.

Mr. Cullinan: Well, I think business men when they enter into any arrangement——

The Court: Whenever there is a controversy, one fellow says, oh, the other fellow did nothing;

he is no good; he beat his wife, or something. That's always what you find in these lawsuits when there is a disagreement afterwards. But usually, when business men get together, they at least think, when they enter into the contract, that each of them is going to get some advantage.

Mr. Cullinan: I think that's so, and I think that a jobber is willing to take a risk—most of them do—when they get into something that they think they are going to make some money out of it and they are willing to have it.

The Court: I don't want to interrupt your argument, because I will give you more, or course, time in connection with this, but we are taking a long time on a matter that seems to me maybe shouldn't have been in court, that it was a matter that business men ought to have sufficient capacity to adjust between themselves, these kind of sorry cases where a lot of technical questions come into the case.

Personally, my feeling in the matter is that there are grave legal obstacles, which may be overcome—I don't know—to the plaintiff's recovering, but I don't think he got a [507] very good deal from the Hunt Company, because he built up a business there which they spoke of, as I mentioned before, in glowing terms and when things were moving along pretty well. His account, it is true, had a big debit side to it, but it was being built up and Hunt was getting twice as much business as they got before. Because the grass looked greener in this bigger field, why, for that reason they suddenly shut him off and legally they may be right. I only mention

this because I think this is the kind of business controversy that deserves a less technical and perhaps more equitable and perhaps a little sentimental consideration in working this out.

Mr. Cullinan: Well, of course, the provision of the——

The Court: I know. You think on the side of Hunt's that this is an afterthought and he couldn't pay up the full balance of the contract so he jockeyed up this idea of suing Hunt for it. Well, a lot of times that's what lawyers are for. I know, at least in my experience in practicing law, sometimes a man doesn't realize that maybe he has some kind of a claim until he is pushed hard and then he goes to a lawyer—usually it is long after the barn door is shut—and maybe his belated advice then appears to the other side, sometimes, because it is belated, to be wholly unmeritorious. What I have just said, Mr. Cullinan, is not very much on the legal side of the case, I appreciate that. [508]

Mr. Cullinan: Well, on the same side of the case, not the legal side, your Honor, on the other hand, Hunt's is not in the business of being a banker for some jobber. They tried to go along with this man. He got way behind in his accounts.

The Court: Let me interrupt you. If I thought that was the reason why this relationship was discontinued, I would not have made the remarks I made. I think the truth of the matter is, and I can only judge that from what I hear, and maybe there are other things that I don't know anything about,

but from what I have heard here, I am satisfied that the status of the account had nothing whatsoever to do with the ending of this man's activities with the company. It came about because they had another method of handling it that they thought was more profitable and a better way of handling it, and it's their right to do that. But that was the reason for it, because Mr. Miller and one of the other men had no hesitancy in saying that the status of the account was not mentioned as the reason, to Mr. Phillips, in discussions, for the discontinuance of the thing. His account had a larger debit balance than it had in the early stages of it, but that amount, as I looked over the statement, was an average that had gone on for a long, considerable period of time before the Hunt people decided to enter into this larger activity with respect to the sales to the commissaries, [509] but I don't think that had anything to do with the matter.

Mr. Cullinan: Well, they had tried to work out various arrangements; they had tried that accounts receivable device, which didn't work out. As the evidence shows, he did make promise of payments, correspondence is full of promises.

The Court: He was about three or four months behind, there was long periods of time there in the collections, and I think Hunt knew that, and it was worth something to them, must have been, to have this business increased. All that was involved there was interest on their money during that period of time and I suppose if any business was worth that,

worth getting for them, that that could have been absorbed in the cost of doing the business.

But I must apologize for taking so much time talking about a non-legal phase of this case. I have seen before cases where business men get into these quarrels where they would be better, and sometimes they do, even in the court and after litigation, to dispose of them themselves.

As I see the legal problems in the case, the main problem, of course, is what was the contract or agreement or understanding that was had, what is the truth of that, and secondly, the question of—depending upon what was the actual agreement, what law applies, and then if, under any of [510] those segments of the case, it would appear that there was a contract which has legal validity to it and it was breached, what, if any, damage did the plaintiffs suffer. All three of those things present some difficulty in figuring out.

I just made this statement to you, Mr. Cullinan, so as to save argument about the facts of the matter because if this was a contract that was for a period of years, if the Court accepts that statement of the plaintiff as being what was said at the time, then you have the legal problem of whether or not, as you have argued, there was sufficient to show that that agreement is taken out of the statute of frauds.

If, on the other hand, the Court were to accept the theory of fact to be, the truth to be that they went into this arrangement and he was given this exclusive jobbing status and no time at all was spe-

cified, as to what legal relationship resulted from that.

Mr. Cullinan: Yes.

The Court: Since there was no corroboration of the plaintiff's statement with respect to this long term contract, I'm more inclined to think that there was no time specified, that this contract was, by its very nature—I should say—or relationship—by its very nature was one that would extend for a substantial period of time and that a substantial period of time would be a reasonable period of [511] time in view of what the plaintiff was undertaking to do and the knowledge of the defendant of what he was undertaking to do, that it was an arrangement that both sides anticipated would run for a substantial length of time, and the best evidence of that is that it did run for a year and a half and then was discontinued because, as I say, some more rosy picture was opened.

Mr. Cullinan: Well, of course, whatever arrangement they had, this plaintiff had breached it by not making the payments because certainly his statement that the credit manager, hardly knowing the man and having a 1950 statement that covered three months, saying to him, "Pay when you are able; there's no credit limit," that is just a totally unbelievable statement. A credit manager wouldn't last very long if he were to make that kind of a deal.

The Court: I don't think the relationship depends necessarily on what the credit manager said. It is what they did that indicates, at least that was the way they were proceeding, that there was some

dissatisfaction on the part of Hunt's that more prompt payments weren't being made but they still continued to carry on, and I think there was some recognition that there were difficulties, that a man that had a large amount of capital wouldn't need to go; they couldn't get someone, in my opinion, that would carry on the kind of pioneering work that had been done to make some [512] money out of this thing—they couldn't get that arrangement with some fellow that had fifty or a hundred thousand dollars; he didn't need Hunt's to enter into that kind of an arrangement. So it necessarily meant someone had to pioneer for a while and that's what happened here. [512-A]

Mr. Cullinan: Yes, the plaintiff who wants to pioneer should have resources to do it and shouldn't depend on the defendant to finance him, and that's what it developed into.

The Court: I don't know if I would agree with you. That's the very cold point of view of the hardheaded didactic credit manager. I sympathize with that point of view; he has a special job to do. But it doesn't necessary follow as a matter of business that that's so.

Well, I don't know whether that has been helpful or not. If you would prefer to write authorities on the legal aspect of this matter——

Mr. Cullinan: Well, I think there are so many involved, the easier way to do it, so that your Honor would have each point and all the authorities pertinent——

The Court: I think you might concentrate on the question of whether the contract that was to be performed within a reasonable time, what is the application of the law to that, and also I think it would be well to point out that if there is a breach, have damages been shown.

Mr. Cullinan: Yes.

The Court: It is a very difficult question. Authorities have all recognized for a long time that is a difficult question. There may be some evidence here that would warrant inferring that there would be some profits here of an accumulative nature in the future. [513]

Mr. Cullinan: There is, of course, also the question here as to whether there was any kind of a contract at all, whether it was just a business arrangement that either party could terminate. That's one of the legal questions.

The Court: It is a question of how you use the word "contract." A layman always thinks of a contract as a piece of paper that has got some writing on it, but of course there are other kinds of contracts. We can refer to it as a relationship under which the parties agreed to certain mutual obligations. In a general sense it is still a contract, if it has mutuality to it, if it complies with the statutes, such as the statute of fraud, or otherwise by other law taken out of reach of the statutes.

Mr. Cullinan: Of course, the questions here are whether there was a contract for any period of time, whether there was a contract for a reasonable time, or whether there was no contract at all for any

period of time, just as an arrangement to make some sales to a man who is going to resell them.

The Court: Well, if that were the situation I would agree with you, but the evidence in this case, it seems to me, is pretty convincing this wasn't just a case where a man was buying merchandise from somebody, isn't a suit for a purchase price of something of that sort. This is an arrangement by which, for certain considerations, the man was given exclusive representation on the part of Hunt's to sell exclusively, and [514] no one else, as their jobber, to the commissaries. So it's more than just a relationship, more than just a situation to buy and sell merchandise one to the other.

Mr. Cullinan: Except, though, your Honor, we don't say at one and the same time——

The Court: If that were the case, I don't think we would be here, because Hunt's must have a thousand customers, more or less. They don't do business with them on a relationship that existed here.

Mr. Cullinan: We don't say to them, though, by the same token we don't say to them, "Now, you must stop all your other business."

The Court: No.

Mr. Cullinan: "And just concentrate on working for Hunt's."

The Court: But the evidence does show that Hunt's felt that it was too costly to them to have their own salesmen representing them in these transactions with the commissaries, that there was an advantage to them to take their own salesmen

off and to handle this business which they thought might be developed into a profitable business by a man, as a jobber, who, buying from them, would build up that business with the commissaries. They must have considered that, because they sent these notices out explaining why they were doing it to the commissaries. [515]

Mr. Cullinan: Those notices, of course, were like a calling card; they let a person know I'm selling Hunt's products in this particular establishment. I don't think that that bulletin has any more status than an ordinary calling card, that a man goes in and he says, "I am representing Hunt's and selling Hunt's products." But Hunt's reason, obviously, for starting with Phillips was not that it was so costly for them to handle the commissary, they just wanted to make their salesmen available for other work.

The Court: It was to their advantage; I wasn't using the term "costly" in the dollars and cents sense, but merely that it was time, other elements, not worth their while. So therefore they were at least amenable—they may not have been seeking this arrangement, but they were amenable to it and they considered it to be an arrangement that added advantages to them.

Mr. Cullinan: I think Hunt's wouldn't go into any arrangement if they didn't think they were going to get some advantage from it in one form or another, of course. I will be glad to submit—— [516]

The Court: Would it be satisfactory to you, counsel, to write a brief?

Mr. Rothert: I am not sure I understand what the proposal is. I am waiting my turn. I know that your Honor doesn't wish a full dress argument on the facts and I won't impose on your Honor's time or attention; but I did have a feeling of misgiving here after listening to the discussion on the facts, and I am wondering whether your Honor would arrive at some definite decision on the facts in his mind without my having a chance to make some presentation.

The Court: Whatever I have expressed on the facts is favorable to your client.

Mr. Rothert: Yes, I understand, although——

The Court: I make no bones about telling you that. It is the legal question that bothers me.

Mr. Rothert: I recognize that, your Honor, but what I mean is I don't agree at all with what Mr. Cullinan states as to what the evidence shows on the fact, and I wouldn't want to burden the Court with addressing myself to the facts if it isn't going to be of any help. But I am willing and I am anxious to present any type of written memorandum or otherwise that your Honor thinks will be of assistance in determining the issues in the case. And whether it will be presented in the usual form of plaintiff opening or whether it will be presented as a matter of a motion to dismiss so that the [517] defendant opens, it makes no difference to me.

The Court: I don't care either in that regard. I think that really the matter arises on the defendant's reserved motion to dismiss the case, because if the motion to dismiss is granted that disposes of the

case. If it is denied, there will be left then only the question as to the sufficiency of the evidence as to damages. So I would offhand think that perhaps it would be better to present the motion first.

Mr. Cullinan: Yes, your Honor.

Mr. Rothert: In the nature of a reserved motion to dismiss at the end of the plaintiff's case?

The Court: That's right, because you recall that——

Mr. Rothert: Yes, I do recall, that was reserved.

The Court: I told him to present his evidence.

Because the legal questions as to the plaintiff's case, exclusive of the question of damages, which is a mixed question of law and fact——

Mr. Rothert: That's right.

The Court: Aside from that the main question of law arises on the motion to dismiss.

Mr. Rothert: As I understand it, the motion to dismiss at the end of the plaintiff's case considers the facts with the deductions and inferences most favorable to the plaintiff. The very brief discussion on that motion held this morning wasn't on that assumption from the facts, but—— [518]

The Court: There really is no great dispute of facts in this case on the main issues. There is a variety of viewpoints on the testimony as to what was said in the meetings from which the relationship or agreement of the parties was said to have grown or emerged. But aside from that, there isn't any great factual issue here—a lot of collateral

matters that go to the heart of the matter as to what was the understanding of the parties.

Mr. Cullinan: I think the practical and expeditious way to handle the presentation would be for me under the discussion here to withdraw the motion and just——

The Court: Submit the case?

Mr. Cullinan: Submit the case, because we have——

The Court: We have some questions——

Mr. Cullinan: There is going to be factual discussion as well as legal discussion.

The Court: I think perhaps you are right. You write the opening memorandum.

Mr. Rothert: Yes, your Honor.

The Court: And treat it as if the case were submitted. If the case is decided in favor of the defendant, we will say, it doesn't make much difference whether it is on a motion to dismiss after all the evidence is in or whether it is on the merits.

Mr. Rothert: On the submission, yes. [519]

The Court: It is not going to make any difference. So I guess you had better take it in the ordinary way.

Mr. Rothert: All right.

The Court: But I think the main question is as I have said on——

Mr. Rothert: I have understood your Honor's comments on it. I think it is helpful to both attorneys in the preparation of the memoranda.

In presenting the opening memorandum for the plaintiff I would ordinarily consider the legal

points that were already argued in the motion to dismiss on the pleadings, and I see only one other legal point has been raised today and that is, that in addition to the lack of written contract, it is now contended that there must also be written authority through Mr. Flynn.

The Court: That is right; that is an additional point.

Mr. Rothert: That is the only one I recognize as a new point.

The Court: On the allegations of the complaint I feel that Judge Harris' decision was correct in denying the motion, and now there is a question as to whether or not the evidence presented is sufficient of course to sustain contention of the estoppel.

Mr. Rothert: I understand that, yes, your Honor.

The Court: I think you should present it. [520]

Mr. Rothert: How much time may I have to present the opening?

The Court: What do you say, ten days—ten, ten and five, or something like that?

Mr. Rothert: Yes, that will be satisfactory with me.

The Court: Will that be all right with you, counsel?

Mr. Cullinan: I am just trying to figure when Christmas comes.

The Court: I was looking at the calendar, too.

Mr. Rothert: Twenty days from now is the 22nd.

The Court: Well, I think maybe you might take 15 days, and then if you take 15 days to reply——

Mr. Cullinan: Fine.

The Court: You won't have to work over the Christmas period, then.

Mr. Rothert: Fifteen, fifteen and——

The Court: What?

Mr. Rothert: One week, seven days?

The Court: Fifteen, fifteen and ten.

Mr. Rothert: That is adequate, yes, your Honor.

The Court: Is that all right?

Mr. Cullinan: Yes, your Honor.

The Court: Also I would suggest in the interval, as you approach the Christmas season you might go outside and buy each other a cup of coffee and maybe you might have a little discussion among yourselves about this case. [521]

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 521 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ F. SWEENEY,

/s/ W. A. FOSTER,

/s/ R. D. NORTON.

[Endorsed]: Filed April 25, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court of the State of California in and for the County of Alameda, with copy of complaint and summons attached.

Bond on Removal.

Answer, counterclaim and cross-complaint of Hunt Food, Inc.

Answer of plaintiffs to counterclaim and cross-claim of defendant.

Motion of defendant to dismiss and for judgment on pleadings.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Defendant's Proposed Modifications to Findings of Fact, Conclusions of Law and Judgment.

Memorandum of Costs of Plaintiff.

Memorandum of Costs by Defendant.

Notice of Appeal.

Supersedeas Bond.

Statement of Points Upon which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

Appellees' Designation of Record on Appeal.

Reporters' Transcript of Proceedings Nov. 28, 29, 30, Dec. 1 and 2, 1955.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ and AR.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of July, 1956.

C. W. CALBREATH,

Clerk;

By /s/ MARGARET P. BEAN,

Deputy Clerk.

[Endorsed]: No. 15216. United States Court of Appeals for the Ninth Circuit. Hunt Foods, Inc., a Corporation, Appellant, vs. Wellington Phillips and H. W. Liholm, Appellees. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: July 27, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,216

HUNT FOODS, INC.,

Appellant,

vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,
Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
MATERIAL TO THE CONSIDERATION
OF THE APPEAL

Hunt Foods, Inc., Appellant, hereby adopts the "Concise Statement of the Points on Which Appellant Intends to Rely on Appeal," filed in the District Court of the above-entitled matter on June 27, 1956, and entered in the typewritten record, as and for its statement of points required under Rule 17(6), and hereby adopts the "Designation of Contents of Record on Appeal," filed in the District Court of the above-entitled matter on June 27, 1956, and appearing in the typewritten record, as and for its designation of record material to the appeal herein, as required by Rule 17(6).

EUSTACE CULLINAN,
BEN C. DUNIWAY,
VINCENT CULLINAN,

By /s/ EUSTACE CULLINAN,
Attorneys for Appellant.

[Endorsed]: Filed January 31, 1956.